CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 02–62)

RIN 1515–AD11

PRESENTATION OF VESSEL CARGO DECLARATION TO CUSTOMS BEFORE CARGO IS LADEN ABOARD VESSEL AT FOREIGN PORT FOR TRANSPORT TO THE UNITED STATES; TECHNICAL CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; technical correction.

SUMMARY: This document contains a technical correction to the final regulations (T.D. 02–62), which were published Thursday, October 31, 2002. The regulations required the advance and accurate presentation of certain vessel cargo declaration information to Customs prior to lading the cargo aboard the vessel at the foreign port and encouraged the presentation of this information electronically.

EFFECTIVE DATE: December 2, 2002.

FOR FURTHER INFORMATION CONTACT: Kimberly Nott, Office of Field Operations, (202–927–0042).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 31, 2002, Customs published a final rule document in the Federal Register (67 FR 66318) as T.D. 02–62. The final rule concerned the requirement to provide advance and accurate presentation to Customs of certain vessel cargo declaration information prior to lading the cargo aboard the vessel at the foreign port and encouraged the presentation of this information electronically.

This correction concerns when a transmission of the required cargo declaration information must be made by an eligible non-vessel operating common carrier (NVOCC). Specifically, in T.D. 02–62, § 4.7(b)(2) of the Customs Regulations (19 CFR 4.7(b)(2)) correctly provided that

Customs must receive from the vessel carrier the vessel's Cargo Declaration, Customs Form 1302, or a Customs-approved electronic equivalent, 24 hours before such cargo was laden aboard the vessel at the foreign port. By contrast, § 4.7(b)(3)(i) inadvertently stated in effect that if an eligible NVOCC elected to file such cargo declaration information with Customs, the NVOCC would have to electronically transmit this information to Customs 24 hours before the related cargo was laden aboard the vessel at the foreign port.

However, under T.D. 02–62, both vessel carriers and NVOCCs were properly intended to be subject to the same 24-hour advance presentation requirement. As such, it was intended that under § 4.7(b)(3)(i) Customs likewise receive from a participating NVOCC the necessary cargo declaration information 24 hours before the related cargo was laden aboard the vessel at the foreign port. This document corrects that unintended inconsistency.

CORRECTION OF PUBLICATION

Accordingly, the publication on October 31, 2002 of the final regulations (T.D. 02–62), which were the subject of FR Doc. 02–27661, is corrected as follows:

> On page 66331, in the second column, in § 4.7, in the first sentence of paragraph (b)(3)(i), on line 14, add between the words "Vessel Automated Manifest System (AMS)" and "24 or more hours" the words "that must be received".

Dated: January 9, 2003.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, January 14, 2003 (68 FR 1801)]

(T.D. 03–03)

RECORDATION OF TRADE NAME: "ORTHOTEC"

AGENY: Customs Service, Treasury.

ACTION: Notice of final action.

SUMMARY: This document provides notice that "ORTHOTEC" is recorded by Customs as the trade name for Orthotec, L.L.C., a Delaware Limited Liability Company organized under the laws of the State of Delaware, located at 9595 Wilshire Blvd., Suite 502, Beverly Hills, California 90212. This application for trade name recordation was properly submitted to Customs and published in the Federal Register. As no public comments in opposition to the recordation of this trade name was received by Customs within the 60-day comment period, the trade name is duly recorded with Customs and will remain in force as long as this trade name is used by this corporation, unless other action is required.

EFFECTIVE DATE: January 7, 2003.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Savoy, Intellectual Property Rights Branch, Office of Regulations & Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W. (Mint Annex) Washington, D.C. 20229; (202) 572–8710.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Trade names adopted by business entities may be recorded with Customs to afford the particular business entity with increased commercial protection. Customs procedure for recording trade names is provided at § 133.12 of the Customs Regulations (19 CFR 133.12) pursuant to section 42 of the Act of July 5, 1946, as amended (15 U.S.C. §1124). Pursuant to this regulatory provision, the Orthotec, L.L.C., a Delaware Limited Liability Company organized under the laws of the State of Delaware, and located at 9595 Wilshire Blvd., Suite 502, Beverly Hill, California 90212, applied to Customs for protection of its trade name "ORTHOTEC".

On Thursday, November 7, 2002, a notice of application for the recordation of the trade name "ORTHOTEC" was published in the Federal Register (67 FR 67894). The notice advised that before final action was taken on the application, consideration would be give to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name and received not later than January 6, 2003. The comment period closed January 6, 2003. No comments were received during the comment period. Accordingly, as provided by § 133.12 of the Customs Regulations, "ORTHOTEC" is recorded with Customs as the trade name of Orthotec, L.L.C., and will remain in force as long as this trade name is used by this corporation, unless other action is required.

The trade name is used on medical devices, more specifically, surgical implants made of stainless steel or titanium for spinal surgery, comprised of hooks, bolts, screws, rods, instruments and containers to hold the goods and instruments.

Dated: January 7, 2003.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, January 13, 2003 (68 FR 1655)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 15, 2003.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SMOKELESS INHALERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice revocation of ruling letters and treatment relating to tariff classification of smokeless inhalers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two ruling letters pertaining to the tariff classification of smokeless inhalers under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. No comments were received in response to this notice.

DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 31, 2003.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572–8785.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a noticed was published on December 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 49, proposing to revoke NY 875303, dated June 17, 1992, and NY 874119, dated May 21, 1992, which classified smokeless inhalers in subheading 3004.90.60, HTSUS. No comments were received in response to this notice.

As stated in the proposed notice, this revocation covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on treatment of substantially identical transactions or on a specific ruling concerning merchandise covered by this notice which was not identified may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY 875303, dated June 17, 1992, and in NY 874119, dated May 21, 1992, two types of smokeless inhalers were classified as medicaments under subheading 3004.90.60, HTSUS. It is now Customs position that these smokeless inhalers are classifiable as other chemical preparations not elsewhere specified or included in subheading 3824.90.91, HTSUS.

"Medicaments" of heading 3004, HTSUS, are medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments (i.e. therapeutic or prophylactic uses). Although nicotine dependency is a medical ailment for purposes of heading 3004, HTSUS, *see* HQ 961666, dated April 14, 1998 (classifying a nicotine transdermal delivery system in heading 3004, HTSUS), the subject smokeless inhalers do not contain medicinal preparations used to treat or prevent nicotine dependency. Therefore, they are outside the scope of the heading.

As the smokeless inhalers consist of a plastic article, cotton and a flavor mixture, they are composite goods, classifiable by their essential character according to GRI 3(b). The flavor mixture imparts the essential character of the inhaler, as it comprises the inhaled component. Accordingly, they are classifiable in subheading 3824.90.91, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY 875303, NY 874119 and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in HQ 966027 and HQ 966028, which are attachments A and B to this document, respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 8, 2003.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 8, 2003.

CLA–2: RR:CR:GC 966027 DBS
Category: Classification
Tariff No. 3824.90.91

MR. DORON DEKEL
8447 De Soto Ave., #5
Canoga Park, CA 91304

Re: Smokeless inhaler; NY 875303 revoked.

DEAR MR. DEKEL:

On June 17, 1992, the Customs National Commodity Specialist Division, New York, issued to you NY Ruling Letter 875303, which classified "Flowers Menthol," a smokeless inhaler, under the Harmonized Tariff Schedule of the United States (HTSUS), as other medicaments, put up in measured doses or in forms or packings for retail sale, of subheading 3004.90.60, HTSUS (now 3004.90.91, HTSUS). We have reconsidered the classification of this article and now believe NY 875303 is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of the above identified ruling was published on December 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 49. No comments were received in response to the notice.

Facts:

The facts as stated in NY 875303 are as follows:

> "Flowers Menthol" are smokeless, substitute cigarettes, constructed from plastic and cotton, which utilize menthol crystals as a mild flavoring agent.
>
> These "cigarettes", which are never lit, are used as a deterrent to smoking by helping to curb the urge to smoke regular cigarettes. One would simply substitute a "Flowers Menthol" "cigarette" for a regular cigarette when the urge to smoke arises. Each substitute cigarette is individually packaged in a blister pack.

Issue:

Whether smokeless inhalers are classifiable as medicaments of heading 3004, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packing for retail sale:
3004.90	Other:
3004.90.91	Other

* * * * * * *

3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.
3824.90	Other:
	Other:
	Other:
	Other:
3824.90.91	Other

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

In the HTSUS, "medicaments" are medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments (i.e., therapeutic or prophylactic uses). HQ 084102, dated November 24, 1989. "Therapeutic use" has been described by the courts in *Austin Chemical Co. v. United States*, 659 F. Supp. 229 (CIT 1987), *aff'd by Austin Chemical Company, Inc. v. United States*, 835 F.2d at 1426 (CAFC 1987). The court first noted that "therapeutic" means "of or relating to the treatment of disease or disorders by remedial agents or methods; CURATIVE, MEDICINAL." *Id.* at 231 (*citing* Webster's Third New International Dictionary (1966)). The court stated that the term "therapeutic use" indicates that a substance, by itself, is in a condition ready for use as a curative. *See Austin*, 659 F. Supp. at 231–32.

Nicotine dependency is a medical ailment for purposes of heading 3004, HTSUS. *See* HQ 961666, dated April 14, 1998 (classifying a nicotine transdermal delivery system which aids in breaking the nicotine dependency associated with smoking in heading 3004, HTSUS). However, unlike the nicotine transdermal delivery system, which contains the drug nicotine, the instant smokeless inhalers do not contain medicinal preparations used to treat or prevent nicotine dependency.

Rather, the instant product offers sensory stimuli intended to curb or satiate the smoker's behavioral desires associated with smoking, such as the oral fixation or the "calming effect" of drawing on a cigarette and inhaling the vapors. An article may be a substitute for another, where it takes the place of the other and has similar characteristics and uses. *See Tai Lung Co. v. United States*, 18 CCPA 35, 37; T.D. 44004. "However, the mere fact * * * that a substance is used in lieu of another does not * * * establish that it is * * * a substitute * * *." *Rudolph Faehndrich et al. v. United States*, 49 Cust. Ct. 1, 5; C.D. 2351 (1962). The instant article is intended to be used in lieu of smoking, but is neither a "substitute" for tariff purposes (e.g., tobacco substitute of heading 2403, HTSUS), nor a medicament, because it lacks medicinal value. Accordingly, heading 3004, HTSUS, does not cover the instant smokeless inhalers. Thus, NY 875303 is in error.

We now must determine the appropriate classification of this product. "Flowers Menthol" is in part a plastic article, in part cotton, and in part a mixture containing menthol crystals. As no single heading describes the article as a whole, the smokeless inhaler is not classifiable according to GRI 1, but is a composite good according to GRI 3. Therefore, we must apply GRI 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F. 3d 969 (CAFC 1997); *Mita Copystar America, Inc. v. U.S.*, 966 F.Supp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex* Corp. v. U.S., 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

We find the flavor mixture predominates over the plastic and cotton components, as it is the inhalant portion of the inhaler that establishes the good's essential character, providing the appeal and purpose of the product. Therefore, "Flowers Menthol" is classifiable as a chemical preparation not elsewhere specified or included under heading 3824, HTSUS.

Holding:

"Flowers Menthol" smokeless inhalers are classified in subheading 3824.90.91, HTSUS, which provides for, "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; other: other: other: other."

Effect on Other Rulings:

NY 875303, dated June 17, 1992, is hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 8, 2003.

CLA–2 RR:CR:GC 966028 DBS
Category: Classification
Tariff No. 3824.90.91

MR. TIM KROUSE
TRADE PARTNERS INTERNATIONAL
2610 S.W. Buckingham Ave.
Portland, OR 97201

Re: Smokeless inhaler; NY 874119 revoked.

DEAR MR. KROUSE:

On May 21, 1992, the Customs National Commodity Specialist Division, New York, issued to you NY Ruling Letter 874119, which classified "Paipo," a smokeless inhaler, under the Harmonized Tariff Schedule of the United States (HTSUS), as other medicaments, put up in measured doses or in forms or packings for retail sale, of subheading 3004.90.60, HTSUS. We have reconsidered the classification of this article and now believe NY 874119 is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of the above identified ruling was published on December 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 49. No comments were received in response to the notice.

Facts:

The facts as stated in NY 874119 is as follows:

> The submitted sample, "Paipo," is a non-smoking, disposable, flavored cigarette substitute, whose flavor is claimed to last more than 24 hours. It resembles a cigarette in appearance and is available in eight flavors (e.g., fruit, lemon-lime, etc.). Among the listed ingredients are various natural essential oils and flavoring agents. "Paipos" are put up in a blister pack, each of which contains 3 "cigarettes", and packaged in a small box for retail sale.

Issue:

Whether smokeless inhalers are classifiable as medicaments of heading 3004, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined ac-

cording to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packing for retail sale:
3004.90	Other:
3004.90.91	Other
* * * * * * *	
3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.
3824.90	Other:
	Other:
	Other:
	Other:
3824.90.91	Other

GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note.

In the HTSUS, "medicaments" are medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments (i.e., therapeutic or prophylactic uses). HQ 084102, dated November 24, 1989. "Therapeutic use" has been described by the courts in *Austin Chemical Co. v. United States*, 659 F. Supp. 229 (CIT 1987), *aff'd by Austin Chemical Company, Inc. v. United States*, 835 F.2d at 1426 (CAFC 1987). The court first noted that "therapeutic" means "of or relating to the treatment of disease or disorders by remedial agents or methods; CURATIVE, MEDICINAL." *Id.* at 231 (*citing* Webster's Third New International Dictionary (1966)). The court stated that the term "therapeutic use" indicates that a substance, by itself, is in a condition ready for use as a curative. *See Austin*, 659 F. Supp. at 231–32.

Nicotine dependency is a medical ailment for purposes of heading 3004, HTSUS. *See* HQ 961666, dated April 14, 1998 (classifying a nicotine transdermal delivery system which aids in breaking the nicotine dependency associated with smoking in heading 3004, HTSUS). However, unlike the nicotine transdermal delivery system, which contains the drug nicotine, the instant smokeless inhalers do not contain medicinal preparations used to treat or prevent nicotine dependency.

Rather, the instant product offers sensory stimuli intended to curb or satiate the smoker's behavioral desires associated with smoking, such as the oral fixation or the "calming effect" of drawing on a cigarette and inhaling the vapors. An article may be a substitute for another, where it takes the place of the other and has similar characteristics and uses. *See Tai Lung Co. v. United States*, 18 CCPA 35, 37; T.D. 44004. "However, the mere fact * * * that a substance is used in lieu of another does not * * * establish that it is * * * a substitute * * *." *Rudolph Faehndrich et al. v. United States*, 49 Cust. Ct. 1, 5; C.D. 2351 (1962). The instant article is intended to be used in lieu of smoking, but is neither a "substitute" for tariff purposes (e.g., tobacco substitute of heading 2403, HTSUS), nor a medicament, because it lacks medicinal value. Accordingly, heading 3004, HTSUS, does not cover the instant smokeless inhalers. Thus, NY 875303 is in error. Accordingly, heading 3004, HTSUS does not cover the instant smokeless inhalers. Thus, NY 875303 is in error.

We now must determine the appropriate classification of this product. "Paipo" is in part a plastic article, in part cotton, and in part a mixture containing natural essential oils and flavoring agents. As no single heading describes the article as a whole, the smokeless in-

haler is not classifiable according to GRI 1, but is a composite good according to GRI 3. Therefore, we must apply GRI 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character.

EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Recent court decisions on the essential character for 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F. 3d 969 (CAFC 1997); *Mita Copystar America, Inc. v. U.S.*, 966 F.Supp. 1245 (CIT 1997), *rehear'g denied*, 994 F. Supp. 393 (1998); *Vista Int'l Packing Co. v. U.S.*, 890 F. Supp. 1095 (CIT 1995). *See also Pillowtex* Corp. v. U.S., 893 F. Supp. 188 (CIT 1997), *aff'd* 171 F. 3d 1370 (CAFC 1999).

We find the flavor mixture predominates over the plastic and cotton components, as it is the inhalant portion of the inhaler, and provides the appeal and purpose of the product. Therefore, "Paipo" is classifiable as a chemical preparation not elsewhere specified or included under heading 3824, HTSUS.

Holding:

"Paipo" smokeless inhalers are classified in subheading 3824.90.91, HTSUS, which provides for, "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; other: other: other: other."

Effect on Other Rulings:

NY 874119, dated May 21, 1992, is hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE REPAIR AND ALTERATION OF PHOTOCOPIERS ABROAD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters and treatment relating to the repair and alteration of photocopiers abroad.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking four ruling letters, and any treatment previously accorded by Customs to substantially identical transactions, pertaining to the eligibility for treatment under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS) of certain photocopiers. Notice of the proposed revocation was published in Vol. 36, No. 49 of the "CUSTOMS BULLETIN" dated December 4, 2002. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after March 31, 2003.

FOR FURTHER INFORMATION CONTACT: Monika Brenner, Special Classification and Marking Branch, (202) 572–8837.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), a notice was published in the "CUSTOMS BULLETIN" on December 4, 2002, Volume 36, Number 49, proposing to revoke four ruling letters pertaining to the treatment provided under subheading 9802.00.50, HTSUS, to the repair and alteration of certain photocopiers. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the law. Any person involved in substantially identical transactions should have advised Customs during the comment period. An import-

er's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking Headquarters Ruling Letters (HRLs) 559418, dated December 12, 1996, 559672, dated December 17, 1996, 560006, dated March 21, 1997, 560290, dated May 10, 2000, and any other ruling not specifically identified in order to reflect the proper classification of the photocopiers under subheading 9802.00.50, HTSUS, pursuant to the analysis set forth in proposed HRLs 562513, 562514, 562515, and 562516. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HRL 562513 revoking HRL 560290, HRL 562514 revoking HRL 559418, HRL 562515 revoking HRL 560006, and HRL 562516 revoking HRL 559672, are set forth as Attachments A through D, respectively, to this document.

In accordance with 19 U.S.C. 1625(c), HRLs 562513, 562514, 562515, and 562516 will become effective 60 days after publication in the "CUSTOMS BULLETIN."

Dated: January 14, 2003.

CRAIG A. WALKER,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2003.

CLA–2 RR:CR:SM 562513 TJM
Category: Classification
Tariff No. 9802.00.50

PORT DIRECTOR
U.S. CUSTOMS SERVICE
610 West Ash Street
San Diego, CA 92188

Re: Revocation of HRL 560290; 9802.00.50 treatment to photocopiers; Kodak; essential identity; repair and alteration; 19 USC 1625(c).

DEAR PORT DIRECTOR:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter ("HRL") 560290, dated May 10, 2000, addressed to you, concerning the classification and eligibility of photocopiers exported to Mexico from the U.S. and returned for duty exemption provided under subheading 9802.00.50, Harmonized Tariff Schedule of the United

States (HTSUS). After review of this ruling, we have determined that the operations in Mexico performed on certain Kodak copiers ("Model A") resulting in "Model D" qualify as "repairs or alterations" as provided under 9802.00.50, HTSUS. For the reasons that follow, this ruling revokes HRL 560290.

Facts:

In HRL 560290, dated May 10, 2000, the facts indicated that Kodak or one of its customers exported used "model A" copier-duplicators which were no longer operational to Mexico, performed various processes to these copiers, and imported model D copier-duplicators to the U.S. It was claimed that the processes performed in Mexico were "repairs or alterations" and that the returned articles qualified for duty-free entry under subheading 9802.00.50, HTSUS. Other copier decisions Customs has issued include Headquarters Ruling Letter (HRL) 559405 dated July 11, 1996; HRL 559418 dated December 12, 1996; HRL 559483 dated October 17, 1996; HRL 559485 dated October 17, 1996; HRL 559672 dated December 17, 1996; HRL 559770 dated January 10, 1997; and HRL 560006 dated March 21, 1997.

The various submissions from your office and Kodak indicated that the conversion from a model A to a model D involved the following operations:

1. The toning station (also referred to as the developer station) was replaced with a new toning station to provide enhanced image quality. Kodak stated that the toning station on the model D operates more efficiently by repositioning the developer roller closer to the image loop, incorporating an internal scavenger which attracts the developing solution, and changing the rotation of the toning roller with respect to the direction of the image loop. The new toning station also permitted the use of an improved developer and more refined toner.
2. Paper level indicators were added to the paper supply drawers to help the customer determine the amount of paper in each drawer without having to stop operations. These are stated to simply be a series of LEDs mounted on the outer front panel which receive electrical signals from the various paper supplies indicating the amount of paper remaining in each drawer.
3. A new tri-modal document feeder was added, including an improved latch, allowing for smoother operation.
4. New trade dress was applied.
5. The copier speed was enhanced from 70 to 85 copies per minute by replacing three sprockets and a chain.
6. Noise was reduced by adding a muffler in the vacuum system and a damper from the paper stop gate.

In addition, the following description of some of the operations performed at various stations was provided:

Station 10: Cabinetry and feeder removal:

The top hopper, feeder cover, and logic molding covers were replaced with new panels. All other panels were reused but painted a different color.

Station 30: Tear down, main frame alterations and cleaning:

Drilling operations were performed to the main frame to accommodate harness modifications and unique components of the model D.

Subassemblies:

The registration assembly was altered to accommodate the addition of the Pressure Assist Corona Transfer (PACT) modification. The PACT modification was stated to keep the paper flatter as it works its way through the imaging process, but allegedly does not change the copier's function. Two new subassemblies were added, a document positioner hopper and a paper supply cover. In the logic and control assembly, the EPROMs were erased and reprogrammed with new software, including an energy saving feature that puts the copier in stand-by mode. The developer station was totally replaced with a new high definition grain station, which allows for superior image quality. The document feeder was replaced with a trimodal feeder that incorporates a semi-automatic positioner.

Station 35: Wiring:

The copier main harness was modified to accommodate the model D new features.

Station 40: Main frame reassembly:

Some main frame components were replaced such as the main drive motor sprocket, clutch, and developer drive sprocket assembly to speed up the copier's performance. The vacuum system is modified to incorporate the ability to automatically duplex, accommodate heavier paper sizes, and reduce noise levels through the addition of a muffler. Two circuit boards were replaced on the operator control panel to include new features of the model D.

Because of design changes, new parts like a solenoid, wire harness, and circuit boards were tested for electrical safety.

Station 120: Functional set up and testing:

Set-up and testing were performed to verify the function of the document positioner, wireform, duplex tray, and new developer station assemblies.

On January 15, 1998, two videos and a "key attributes matrix" were submitted showing the two models side-by-side and breaking down a copier into 185 attributes Kodak has identified as key to a copier. The similarities and differences between the two models were explained by focusing on the key subassemblies referred to in Additional Note 5, Chapter 90, HTSUS. The matrix showed many of the features to be the same. The differences included a change in copy speed. In the Imaging Assemblies, the changes were the removal of one electrically conductive magnetic roller, and a change in the bias voltage applied to the development mechanism. A change in voltage and magnetic rollers was done to improve development of half tones and image resolution. Although this change altered and improved the imaging process, it was stated that the majority of the imaging technology and hardware remained the same. In the cleaning/erasing assembly, there was a new LED front side interframe erase bar, and a new vacuum magnetic scavenger roller assembly. A distinction between the two models was that in the model A, the bar was located to illuminate the back side of the film loop, whereas on the model D, the bar is located on the front side of the film loop. Both features serve the same function. Relocation in the model D was necessary to make space for the modified developer station. In the charging assembly, the original transfer was not pressure assisted so a PACT (Pressure Assisted Corona Transfer) was added. No differences were claimed between the two models in the Optics or Image Fixing Assemblies. In the User Control assemblies, there was one difference, the color of the LEDs. In the paper handling assemblies, the only difference between the two models was that model A had no paper level indicators. What is unique to the model A was its trade dress and the height of the operator control panel. Otherwise, it was stated that the two models were the same in terms of their features and characteristics. Of the 185 characteristics listed, 174 were stated to be the same, 11 were new in the model D, and 2 were unique to the model A.

In previous Kodak submissions, it was indicated that the major parts in the toner and developer assembly are the toner container, replenisher, developer, and magnet rollers, a gear box, sump casting, drive shaft plus a toner concentration monitor and miscellaneous gears, bearings and hardware, and that the function of the toner and developer assembly is to receive toner from a bottle and pass it to the image loop for transfer onto the paper on which the image results.

In the meeting on January 27, 1998, Customs also requested more details concerning the repairs performed, as prior Kodak submissions indicated the replacement of "worn parts." Customs specifically requested a list of the parts that are replaced 100 percent of the time during the repair process.

In a letter from counsel for Kodak, dated March 10, 1998, it was stated that there are approximately 3,100 parts making up a copier and they are separated into three categories: A parts costing more than $11.00 each; B parts costing between $2.50 and $11.00; and C parts costing less than $2.50. Of the parts that are replaced 100 percent of the time, it was stated that there were 143 parts replaced with a value over $2.50; the C parts were entirely omitted. Of the 143 parts, 9 parts were listed: wire harnesses, muffler boxes, fuser assemblies, paper supplies, IQE stations, blowers, cabinetry, logic control units, and registrations. After Customs request for a more detailed list, on April 7, 1998, it was stated that 124 out of a total of 877 A and B parts were replaced, and the following parts were listed: solenoids, filters, switches, sensors, brushes, actuators, paper feed rollers, clutches, chains, bearings, brackets, pulleys, belts, valves, hoses, guide plates, circuit boards, labels, motors, casters, panels, and springs. On April 20, 1998, a complete list of all 124 A and B

parts replaced was submitted, in what the letter referred to as "engineering short-hand." Customs also requested information regarding whether a particular part was a consumable; however, this information was not provided. While the model A has a magnetic scavenger, when it was converted to the model D, the roller was replaced with a vacuum scavenger for the purpose of the reduction in image quality defects. The last difference between the two models was the addition of a document positioner. It allows the operator to feed single originals across the platen glass for imaging.

In regard to the previous Kodak submissions, your office stated that the exported copiers did not possess the necessary mechanical hardware, circuitry, document positioner, tri-modal feeder, auto-sizing capabilities, PACT and programming required by the imported copier. Your office stated that the tri-modal feeder takes normal paper weights and sizes automatically through the recirculating feeder, or it copies odd size and weight originals through the semi-automatic positioner, or it allows for manual copying. The auto-sizing capabilities reduce the image size of the original to fit the selected paper supply, and it is capable of offset stacking. The PACT is also not a simple mechanical device which holds a piece of paper in place to enhance the quality of the copy produced during the imaging process, but rather its purpose is to aid in preventing white spots on the second side of duplex copies in low humidity environments. Your office stated that the registration assembly (mechanical) was altered to accommodate the addition of the PACT. Registration assembly was done by installing a new circuit board and wire harness in the main frame. A paper supply cover and a document positioner hopper were created to guide and capture originals.

Issue:

Whether the conversion of a Kodak "Model A" copier to a Kodak "Model D" copier constitutes a repair or alteration within the meaning of subheading 9802.00.50, HTSUS, thereby qualifying the returned Model D copier for the duty exemption under this tariff provision.

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides a complete or partial duty exemption for articles returned to the U.S. after having been exported to be advanced in value or improved in condition by means of repairs or alterations. Articles returned to the U.S. after having been repaired or altered in Mexico, whether or not pursuant to warranty, are eligible for duty-free treatment, provided the documentation requirements of section 181.64, Customs Regulations (19 CFR § 181.64), are satisfied. In particular, the documentation required includes a declaration from the person who performed the repairs or alterations, describing the operations performed and the value and cost of such operations, and including a statement that "no substitution whatever had been made to replace any of the goods originally received."

Entitlement to the benefits of subheading 9802.00.50, HTSUS, are precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Tariff treatment under subheading 9802.00.50, HTSUS, is also precluded where the exported articles are incomplete for their intended use prior to the foreign processing. *Guardian*; *Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd*, 66 CCPA 88, C.A.D. 1225, 82, 599 F.2d 1015, 1019 (1979).

In *Press Wireless v. United States*, 6 Cust. Ct. 102, C.D. 438 (1941), the Customs Court held that repairs are operations necessary to restore articles to their original condition, but cannot be so extensive as to destroy the identity of the exported article or create a new or different article. (*See also* 19 CFR § 181.64, which defines "repairs or alterations" as the restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the U.S.).

In previous rulings, we have held that subheading 9802.00.50, HTSUS, will be applicable to articles subject to both partial and complete disassembly, where repairs are made and parts are replaced as long as the essential components and therefore the identify of the article remain intact throughout the repair process. For example, in HRL 554731, dated February 2, 1989, Customs considered fuel injectors which involved the replacement of parts and cleaning after disassembly. Customs determined that the fuel injectors qualified for subheading 9802.00.50, HTSUS, treatment, as long as the adapter and re-

tainer of the fuel injector were not replaced and remained together as a matched set, as these constituted the essential identity of the fuel injector.

In HRL 558858/558859, dated March 11, 1996, Customs considered seven models of used copier "hulks" which were repaired, upgraded, and/or modified in Mexico. In each case, the frame of the "hulk" remained intact, and components such as the wiring harnesses, optics assemblies, printed circuit boards, and other electronic subassemblies remained assembled to the hulk at all times. The operations performed in Mexico involved removing the covers, feeder assembly, fuser, developer houser, xerographic motor, control panel, bypass, platen glass, coroton, copy cartridge, and bypass tray assembly. The covers were sanded and painted, and the platen glass and other non-repairable parts were scrapped. Next, the fuser, developer houser and bypass were sent to subassembly stations for repair. The partially torn-down hulk was then sent to an assembly and repair area where the enabler, low and high voltage power supplies, power cord, main printed wiring board assemblies (pwba) paper size pwba, feeder motor, copy cartridge, counter solenoid, counter, balance spring, half rate cartridge, and front/rear rail were removed, repaired, and reassembled along with the previously removed parts.

During the period of 1992–1993, in HRL 558858/558859, the frames, optics, wiring harnesses, optical control boards, optical drive motor, noise filter, fans, blower, discharge lamp, lower cover base, paper feeder motor, ac driver and sensor pwbas, and the low and high voltage power supplies were removed from the hulk frame during the repair assembly process. However, such parts were identified by bar code, and new parts were either used if required, or the used repaired parts were returned to the same model number. It was found in that case that the essential components of the copiers remained intact throughout the repair process, and did not lose their identify as result of the Mexican operations.

In HRL 558858/558859, the EPROMS contained in the copier's control panel were replaced or reprogrammed so that the copier could perform upgraded tasks, such as operating a noise reduction package or an automatic stapler. In regard to the replacement or reprogramming of EPROMS, which upgraded the copiers to conform to current industry standard, Customs determined that this did not change the identify of the exported articles, but rather improved the product and advanced its value. Accordingly, Customs found in that case that the copiers qualified for subheading 9802.00.50, HTSUS, treatment.

We note that in HRL 558858/558859, Customs stated that subheading 9802.00.50, HTSUS, is applicable to articles subject to both partial and complete disassembly, where parts are replaced, as long as the essential components and therefore the identity of the article remains intact throughout the repair operation. As determined in HRL 558858/558859, the copiers were found not to have lost their identity as a result of the foreign operations. We note that in HRL 555819, dated October 11, 1991, it was stated that the replacement and/or addition of parts to restore products to their original condition may constitute repair operations for purposes of subheading 9802.00.50, HTSUS, if the particular article does not lose its identity and the replacements and/or additions are not so extensive as to create a new or different article. In HRL 555117, dated December 22, 1988, the essential components were also required to be tagged as a matched set.

On the issue of enhanced copier quality, we note that the Court in *Royal Bead Novelty Co., Inc. v. United States*, 68 Cust. Ct. 154, C.D. 4353 (1972) and Customs in HRL 559648 dated May 20, 1996, concluded that a change in the quality of an article resulting from further processing does not preclude application of 9802.00.50. *See also* HRL 557024, dated June 30, 1993 (involving the enhancement of stock computers in Canada), HRL 560245, dated April 4, 1997 (installation of Mobile satellite communications tracking system on trucks in Canada).

We note that under Additional Note 5, Chapter 90, HTSUS, copier assemblies are grouped as follows: (a) Imaging assemblies; (b) Optics assemblies; (c) User control assemblies; (d) Image fixing assemblies; (e) Paper handling assemblies; and (f) Combination of the above specified assemblies. In our opinion, the order of the listed assemblies, (a) through (e), reflected in U.S. Note 5, is indicative of their significance to the copier. We note that the major components of a typical high-volume photocopier include the photoconductor, a primary charger, and systems for exposure, toning, transfer, erasing, and cleaning. *McGraw Hill Encyclopedia of Science & Technology*, Vol. 13 (1987). We also note that cartridges and developer, fuser rollers and oil, the photoconductor belt, and cleaning brush are consumables which are replaced approximately every 300,000 copies (except for

the cartridges which are replaced about every 10,000 copies). Therefore, for purposes of our determination of eligibility for subheading 9802.00.50, HTSUS, treatment, we have focused upon the effect of the operations performed abroad upon the above copier assemblies.

The drum is the "heart" of the copier and almost every step involved with making a copy takes place around the drum. *Kuaimoku, Photocopier Maintenance and Repair Made Easy (1st Ed. 1994).* There are eight main steps in the copy process all of which involve the imaging assemblies: (1) charging, (2) exposing, (3) developing, (4) transferring, (5) separating, (6) fusing, (7) cleaning, and (8) erasing. The charging corona unit applies the charge on the drum. The exposing step illuminates the document and projects the image on the drum and involves the platen glass, exposure lamp, reflectors, aperture, and manual exposure control. Also involved in exposure is the projection of the image onto the drum's surface which involves the mirrors, scanner carriage, solid lens and drums of the optical system. The developer section involves the developer (toner and carrier mix); bucket roller; magnetic roller, bias circuit, toner-carrying screw, and developer section body. The transfer step removes the toner image from the drum and places it onto the copy paper by applying a strong electrical charge from the transfer corona to the back side of the copy paper.

With regard to the Model A to D process in the instant case, Customs found in HRL 560290 that replacing the toner and developer assembly was a significant change to the imaging assemblies, which along with other changes in the paper handling assembly (e.g., paper level indicators), LED erase bar, cleaning housing, and scavenger changed the copier's essential identity.

It is now Customs view that the essential identity of the copiers was retained when processed in Mexico. The record reflected that Kodak tracked which parts and subassemblies are removed from a given carcass through the use of unique inventory control numbers. With regard to the Model A to D process, the differences between the toner and developer assembly and cleaning/erase assemblies of Model A and Model D resulted in a more efficient presentation of the toner to the latent image.

The processing of the two assemblies which are noted above as the two most important assemblies (i.e. imaging and optical assemblies) in a photocopier are in our view not ones which suffice as altering the essential identity of the copier. Although certain parts of these were replaced, the processing did not destroy the essential identity of the copier. As we noted in HRL 555819, replacement and/or addition of parts that were not so extensive as to create a new or different article constitute repair operations for purposes of subheading 9802.00.50, HTSUS. Also, as mentioned in HRL 558858/558859, subheading 9802.00.50, HTSUS, is applicable to articles subject to partial and/or complete disassembly as long as the essential components and the identity of the article remain intact.

It is now clear that many of the replaced parts are parts that can be serviced in the field, and that they are more akin to what we would consider to be "consumables", or parts that wear out with time and need to be repaired or replaced to ensure the continued functioning of the photocopier.

Accordingly, with regard to the Model A to D process, it is now our opinion that, although the processing involved extensive reconditioning of numerous parts and replacement of a number of parts resulting in an enhancement of certain copier functions, the changes were not so extensive as to destroy the essential identity of the exported photocopier or create a new or commercially different article. Furthermore, the fact that many of the parts are identified as being able to be replaced in the field, indicates that the replacement of such parts restore the products to their original condition and, therefore, may be considered "repairs" within the meaning of subheading 9802.00.50, HTSUS.

Holding:

On the basis of the information submitted, it is our opinion that the Mexican operations enumerated above with regard to the conversion of Model A to Model D constitute "repairs or alterations" since they did not destroy the identity of the exported copiers or create new or commercially different articles. Therefore, the imported Model D copiers are eligible for the full duty exemption under subheading 9802.00.50, HTSUS. Consistent with this ruling, HRL 560290, dated May 10, 2000, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2003.

CLA–2 RR:CR:SM 562514 TJM
Category: Classification
Tariff No. 9802.00.50

PORT DIRECTOR
U.S. CUSTOMS SERVICE
610 West Ash Street
San Diego CA 92188

Re: Revocation of HRL 559418; treatment to photocopiers; Kodak; essential identity; repair and alteration; 19 USC 1625(c).

DEAR PORT DIRECTOR:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter ("HRL") 559418, dated December 12, 1996, addressed to you, concerning the classification and eligibility of photocopiers exported to Mexico from the U.S. and returned for duty exemption provided under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS). After review of these rulings, we have determined that the operations in Mexico performed on certain Kodak copiers ("Model B") resulting in "Model D" qualify as "repairs or alterations" as provided under 9802.00.50, HTSUS. For the reasons that follow, this ruling revokes HRL 559418.

Facts:

In HRL 559418, dated December 12, 1996, the facts indicate that Kodak exported used model B copier-duplicators to Mexico, performed various processes to these copiers, and imported model D copier-duplicators to the U.S. It was claimed that the process performed in Mexico constituted "repairs or alterations" and that the returned articles qualified for duty-free entry under subheading 9802.00.50, HTSUS.

Before describing the processes performed to make a model D from a model B, counsel described the processes performed on a model B resulting in a model C (the subject of Headquarters Ruling Letter (HRL) 559483, dated October 17, 1996, concluding that the conversion from a model B to model C constituted acceptable repair or alterations), as it is stated that there were a number of similarities between the two types of processes. Further, counsel noted that the processes performed in the model B to model C conversion were almost identical to those performed in the refurbishing of the model B which remained a model B.

The model B processes performed when there is no change in model number involve disassembling the copiers, cleaning them, and replacing worn parts. It was also stated that if there was an engineering enhancement, newer model parts were installed to replace old and outdated ones. The disassembled subassemblies were routed through subassembly work stations with unique identifiers so that the repaired subassemblies could be installed into the same copier during the reconditioning phase. According to counsel, the Mexican plant did not perform optical alignments; therefore, the reassembly process kept subassemblies together which had been mated at the time of original manufacture. The copier underwent a set-up and test process and the cabinetry was reinstalled. It is alleged that the reconditioned model B copier was returned to the U.S. without change to its essential components (the image capture system (lenses and film handling assembly)). Both of the copiers were stated to be referred to as "indirect process electrophotostatic copier," and six Erasable Programmable Read-Only Memory chips ("EPROM") were erased and reprogrammed to accommodate updated operating instructions.

Next, counsel presented the processes performed to convert a model B to a model C. It was stated that none of the operations sped up the photocopier or altered the type or size of paper the copier is able to process. Speed and paper size and type are stated by counsel to be the criteria in the marketplace to determine whether or not a copier has been upgraded. The only features which appeared on the model C which did not appear on the model B were the specific document feeder and the Pressure Assist Corona Transfer (PACT). These two features keep the paper flatter as it works its way through the imaging process but allegedly does not change the copier's function. When the document feeder was installed, it required a modification to the static eliminator harness in the duplex tray and

the positioner interlock harness in the cabinetry as the remaining internal space was diminished. As a result, a new wire harness was inserted to make the static eliminator smaller.

Counsel also stated that new circuit boards were substituted whether or not the processes resulted in a change in model number. However, the model C required different circuit boards. The existing EPROM was reprogrammed and the input/output boards were modified by soldering an additional wire which allowed the machine to operate either as a model B or a model C. The EPROMS reprogramming supposedly arose because there were changes to the operator control panel.

Counsel stated that the additional steps taken which resulted in a model D were that that model B toning station was replaced with a new toning station which enhanced the image quality. The paper level indicators were added to the paper supply drawers to help customers determine the amount of paper in each supply drawer without having to stop copier operations. An improved latch was added to the document feeder allowing for smoother operation. There was also a new trade dress in the form of different color stripes (aqua) on the front of the copier.

In addition, counsel stated that there were a few minor steps added to the normal reconditioning process. Holes were added to the mainframe to accommodate new harnesses. There was also the installation of a reprogrammed set of six EPROMS to allow the software to relate to all of the new functions, plus an additional energy saving feature was added to the software.

The chart of the model B to model D process indicated that in regard to the Imaging Assemblies, the film belt and worn components were replaced and a new LED erase bar was installed in the photoreceptor belt and handling assembly; a new toner and developer assembly was installed; worn components were replaced in the charging assemblies; and an upgraded cleaning housing was added and a new scavenger was installed in the cleaning assembly.

On November 27 and December 6, 1996, counsel provided additional explanations of certain operations in response to our request. It is stated that the IQE station slider, plenum assembly build, backup slider assembly, and assembly driver roller were the worn components that were replaced in the photoreceptor belt and handling assembly. The IQE station slider basically allows the developer assembly to be removed from the machine without disassembling the machine. The new model of the plenum assembly build installed into the model D uses hoses and ducts instead of magnets to collect excess toner flakes and developer from the film loop. The backup slider assembly moves the image loop toward the developer roller when acutated. The assembly driver roller starts the movement of the image loop around the film core area, and it is stated that worn out rollers were replaced and the same rollers are used regardless of the resulting finished model.

In regard to the charging assemblies, the information received on December 6, 1996, indicates that the worn components replaced are those which naturally wear out during normal copier operations, such as the corona wires (provides the charge to the image loop), the primary (gives off the charge), and the grill (takes the charge from the corona wire and disburses it over the loop).

In regard to the toner and developer assembly, it is indicated that the major parts are a toner container, replenisher, developer, and magnet rollers, a gear box, sump casting and drive shaft plus a toner concentration monitor and miscellaneous gears, bearings and hardware. In some instances, it is stated that a scavenger is present. It is stated that the configuration and number of changes depend on the specific finished copier model involved. Also, the function of the toner and developer assembly is to receive toner from a bottle and pass it to the image loop for transfer onto the paper on which the image results.

In regard to the cleaning housing, the information received on December 6, 1996, indicates that its function is to eliminate contamination on the film path, and that its major part is a casting. The model B casting was plastic while the model D casting is aluminum. In regard to the LED erase bar, it is indicated that it erases residual information on the image loop between copies.

In regard to the Optics Assemblies, the chart indicates that the platen glass was replaced, and worn components were replaced in the lens/mirror assembly. The information received on December 6, 1996, indicates that the worn components replaced in the lens/mirror assembly are mechanical ones, such as the timing belts and pulleys which slide the lens assembly on its guides by means of a high precision motor during the imaging process.

It is also stated that if a lens/mirror is scratched or broken, the lens or mirror itself will be replaced.

In regard to the User Control Assemblies, the chart indicates that worn components and a new display panel with a new color scheme were replaced in the operator control panel assembly. In regard to the Image Fixing Assemblies, the fuser and pressure roller and worn components were replaced in the fusing assembly.

In regard to the Paper Handling Assemblies, the chart indicates that a new document feeder/positioner assembly was made reusing some components and incorporating a semi-automatic position feature; worn components were replaced and paper level indicators were added in the paper supply assembly; worn components were replaced and a PACT modification was added to the registration assembly; and worn components were replaced in the duplex paper path assembly, transport assemblies, and vacuum system. The information received on December 6 indicates that shafts, roller, wire form, solenoids, and sensors (in the duplex tray) are replaced in the transport assemblies.

In regard to the logic and control unit, the chart indicates that failed components were replaced and the EPROMS were reprogrammed to accommodate the semi-automatic position and paper level indicating features.

As indicated above, the scavenger was replaced in the cleaning assembly with one of a more efficient design. In a letter dated December 21, 1994, counsel explained that the scavenger system is designed to remove any residual toner or carrier left on the image medium. Its purpose is to make clearer copies. At the time the letter was written, it was indicated that due to the design flaws the new scavenger system was not used.

Issue:

Whether the operations performed in Mexico, as described above constitute "repairs or alterations" under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS).

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides a complete or partial duty exemption for articles returned to the U.S. after having been exported to be advanced in value or improved in condition by means of repairs or alterations. Articles returned to the U.S. after having been repaired or altered in Mexico, whether or not pursuant to warranty, are eligible for duty-free treatment, provided the documentation requirements of section 181.64, Customs Regulations (19 CFR § 181.64), are satisfied. In particular, the documentation required includes a declaration from the person who performed the repairs or alterations, describing the operations performed and the value and cost of such operations, and including a statement that "no substitution whatever had been made to replace any of the goods originally received."

Entitlement to the benefits of subheading 9802.00.50, HTSUS, are precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Tariff treatment under subheading 9802.00.50, HTSUS, is also precluded where the exported articles are incomplete for their intended use prior to the foreign processing. *Guardian*; *Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd*, 66 CCPA 88, C.A.D. 1225, 82, 599 F.2d 1015, 1019 (1979).

In *Press Wireless v. United States*, 6 Cust. Ct. 102, C.D. 438 (1941), the Customs Court held that repairs are operations necessary to restore articles to their original condition, but cannot be so extensive as to destroy the identity of the exported article or create a new or different article. (*See also* 19 CFR § 181.64, which defines "repairs or alterations" as the restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the U.S.).

In previous rulings, we have held that subheading 9802.00.50, HTSUS, will be applicable to articles subject to both partial and complete disassembly, where repairs are made and parts are replaced as long as the essential components and therefore the identify of the article remain intact throughout the repair process. For example, in HRL 554731, dated February 2, 1989, Customs considered fuel injectors which involved the replacement of parts and cleaning after disassembly. Customs determined that the fuel injectors qualified for subheading 9802.00.50, HTSUS, treatment, as long as the adapter and re-

tainer of the fuel injector were not replaced and remained together as a matched set, as these constituted the essential identity of the fuel injector.

In HRL 558858/558859, dated March 11, 1996, Customs considered seven models of used copier "hulks" which were repaired, upgraded, and/or modified in Mexico. In each case, the frame of the "hulk" remained intact, and components such as the wiring harnesses, optics assemblies, printed circuit boards, and other electronic subassemblies remained assembled to the hulk at all times. The operations performed in Mexico involved removing the covers, feeder assembly, fuser, developer houser, xerographic motor, control panel, bypass, platen glass, coroton, copy cartridge, and bypass tray assembly. The covers were sanded and painted, and the platen glass and other non-repairable parts were scrapped. Next, the fuser, developer houser and bypass were sent to subassembly stations for repair. The partially torn-down hulk was then sent to an assembly and repair area where the enabler, low and high voltage power supplies, power cord, main printed wiring board assemblies (pwba) paper size pwba, feeder motor, copy cartridge, counter solenoid, counter, balance spring, half rate cartridge, and front/rear rail were removed, repaired, and reassembled along with the previously removed parts.

During the period of 1992–1993, in HRL 558858/558859, the frames, optics, wiring harnesses, optical control boards, optical drive motor, noise filter, fans, blower, discharge lamp, lower cover base, paper feeder motor, ac driver and sensor pwbas, and the low and high voltage power supplies were removed from the hulk frame during the repair assembly process. However, such parts were identified by bar code, and new parts were either used if required, or the used repaired parts were returned to the same model number. It was found in that case that the essential components of the copiers remained intact throughout the repair process, and did not lose their identify as a result of the Mexican operations.

In HRL 558858/558859, the EPROMS contained in the copier's control panel were replaced or reprogrammed so that the copier could perform upgraded tasks, such as operating a noise reduction package or an automatic stapler. In regard to the replacement or reprogramming of EPROMS, which upgraded the copiers to conform to current industry standard, Customs determined that this did not change the identify of the exported articles, but rather improved the product and advanced its value. Accordingly, Customs found in that case that the copiers qualified for subheading 9802.00.50, HTSUS, treatment.

We note that in HRL 558858/558859, Customs stated that subheading 9802.00.50, HTSUS, is applicable to articles subject to both partial and complete disassembly, where parts are replaced, as long as the essential components and therefore the identity of the article remains intact throughout the repair operation. As determined in HRL 558858/558859, the copiers were found not to have lost their identity as a result of the foreign operations. We note that in HRL 555819, dated October 11, 1991, it was stated that the replacement and/or addition of parts to restore products to their original condition may constitute repair operations for purposes of subheading 9802.00.50, HTSUS, if the particular article does not lose its identity and the replacements and/or additions are not so extensive as to create a new or different article. In HRL 555117, dated December 22, 1988, the essential components were also required to be tagged as a matched set.

On the issue of enhanced copier quality, we note that the Court in *Royal Bead Novelty Co., Inc. v. United States*, 68 Cust. Ct. 154, C.D. 4353 (1972) and Customs in HRL 559648 dated May 20, 1996, concluded that a change in the quality of an article resulting from further processing does not preclude application of 9802.00.50. *See also* HRL 557024 dated June 30, 1993 (involving the enhancement of stock computers in Canada), HRL 560245 dated April 4, 1997 (installation of Mobile satellite communications tracking system on trucks in Canada).

We note that under Additional Note 5, Chapter 90, HTSUS, copier assemblies are grouped as follows: (a) Imaging assemblies; (b) Optics assemblies; (c) User control assemblies; (d) Image fixing assemblies; (e) Paper handling assemblies; and (f) Combination of the above specified assemblies. In our opinion, the order of the listed assemblies, (a) through (e), reflected in U.S. Note 5, is indicative of their significance to the copier. We note that the major components of a typical high-volume photocopier include the photoconductor, a primary charger, and systems for exposure, toning, transfer, erasing, and cleaning. *McGraw Hill Encyclopedia of Science & Technology*, Vol. 13 (1987). We also note that cartridges and developer, fuser rollers and oil, the photoconductor belt, and cleaning brush are consumables which are replaced approximately every 300,000 copies (except for

the cartridges which are replaced about every 10,000 copies). Therefore, for purposes of our determination of eligibility for subheading 9802.00.50, HTSUS, treatment, we have focused upon the effect of the operations performed abroad upon the above copier assemblies.

The drum is the "heart" of the copier and almost every step involved with making a copy takes place around the drum. *Kuaimoku, Photocopier Maintenance and Repair Made Easy (1st Ed. 1994)*. There are eight main steps in the copy process, all of which involve the imaging assemblies: (1) charging, (2) exposing, (3) developing, (4) transferring, (5) separating, (6) fusing, (7) cleaning, and (8) erasing. The charging corona unit applies the charge on the drum. The exposing step illuminates the document and projects the image on the drum and involves the platen glass, exposure lamp, reflectors, aperture, and manual exposure control. Also involved in exposure is the projection of the image onto the drum's surface which involves the mirrors, scanner carriage, solid lens and drums of the optical system. The developer section involves the developer (toner and carrier mix); bucket roller; magnetic roller, bias circuit, toner-carrying screw, and developer section body. The transfer step removes the toner image from the drum and places it onto the copy paper by applying a strong electrical charge from the transfer corona to the back side of the copy paper.

With regard to the Model B to D process in the instant case, Customs found in HRL 559418 that replacing the toner and developer assembly, installing a new LED erase bar, and adding an upgraded cleaning housing and a new vacuum scavenger in the cleaning assembly were significant changes to the imaging assemblies, which along with other changes in the paper handling assembly (paper level indicators), changed the copier's essential identity.

It is now clearer that many of the replaced worn components are parts that can be serviced in the field, and that they are more akin to what we would consider to be "consumables", or parts that wear out with time and need to be repaired or replaced to ensure the continued functioning of the photocopier.

For instance, in the imaging assemblies, the processing included the replacement of the film belt and worn components. A new LED erase bar was installed in the photoreceptor belt. It is stated that the IQE station slider, plenum assembly build, backup slider assembly, and assembly driver roller were the worn components that were replaced in the photoreceptor belt and handling assembly. The IQE station slider basically allows the developer assembly to be removed from the machine without disassembling the machine. The new model of the plenum assembly build installed into the model D uses hoses and ducts instead of magnets to collect excess toner flakes and developer from the film loop. The backup slider assembly moves the image loop toward the developer roller when actuated. The assembly driver roller starts the movement of the image loop around the film core area, and it is stated that worn out rollers were replaced and the same rollers are used regardless of the resulting finished model.

In regard to the charging assemblies, the information received on December 6, 1996, indicated that the worn components replaced were those that naturally wear out during normal copier operations, such as the corona wires (provides the charge to the image loop), the primary (gives off the charge), and the grill (takes the charge from the corona wire and disburses it over the loop).

Regarding optics assemblies, the platen glass was replaced and worn components were replaced in the lens/mirror assembly. The worn components include mechanical parts such as timing belts and pulleys which slide the lens assembly on its guides.

This processing of the two assemblies which are noted above as the two most important assemblies in a photocopier are in our view not ones which suffice as altering the essential character of the copier. Although certain parts of these assemblies were replaced, the processing did not destroy the essential identity of the copier. As we noted in HRL 555819, replacement and/or addition of parts that are not so extensive as to create a new or different article constitutes repair operations for purposes of subheading 9802.00.50, HTSUS. Also, as mentioned in HRL 558858/558859, subheading 9802.00.50, HTSUS, is applicable to articles subject to partial and/or complete disassembly as long as the essential components and the identity of the article remain intact.

Accordingly, with regard to the Model B to D process, it is now our opinion that, although the foreign processing involved extensive reconditioning of numerous parts and replacement of a number of parts resulting in an enhancement of certain copier functions, the changes made are not so extensive as to destroy the essential identity of the exported

photocopier or create a new or commercially different article. Furthermore, the fact that many of the parts are identified as being able to be replaced in the field, indicates that the replacement of such parts restore the products to their original condition and, therefore, may be considered "repairs" within the meaning of subheading 9802.00.50, HTSUS.

Holding:

On the basis of the information submitted, it is our opinion that the Mexican operations enumerated above with regard to the conversion of Model B to D constitute "repairs or alterations" since they did not destroy the identity of the exported copiers or create new or commercially different articles. Therefore, the imported Model D copiers are eligible for the full duty exemption under subheading 9802.00.50, HTSUS. Consistent with this ruling, HRL 559418, dated December 12, 1996, is hereby revoked.

CRAIG A. WALKER,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2003.
CLA–2 RR:CR:SM 562515 TJM
Category: Classification
Tariff No. 9802.00.50

PORT DIRECTOR
U.S. CUSTOMS SERVICE
Los Angeles CA 90731

Re: Revocation of HRL 560006; 9802.00.50 treatment to photocopiers; Kodak; essential identity; repair and alteration; HQ 558858; HQ 558859; HQ 555819; HQ 555117; HQ 557024; HQ 560245.

DEAR PORT DIRECTOR:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter ("HRL") 560006, dated March 21, 1997, addressed to you, concerning the classification and eligibility of photocopiers exported to Mexico from the U.S. and returned for duty exemption provided under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS). After review of that ruling, we have determined that the operations in Mexico performed on certain Kodak copiers ("Model C") resulting in "Model D" qualify as "repairs or alterations" as provided under 9802.00.50, HTSUS. For the reasons that follow, this ruling revokes HRL 560006.

Facts:

In HRL 560006, dated March 21, 1997, the facts indicated that Kodak sent to Mexico certain copiers ("Model C") which were no longer operational for repairs and modifications. When the operations were completed, the copiers were returned to the United States as Model D copiers.

In Mexico, the following operations were stated to be performed:

> The process began with evaluating the incoming copier and its subassemblies. The unit was then partially disassembled, and the mainframe, parts and subassemblies proceeded to work stations where they were cleaned, worn parts were replaced or repaired, lubrication was applied, and any necessary testing was completed. All copiers had their cabinetry repainted in Mexico, but parts generally were repaired or replaced only as needed. Kodak stated that in the interest of customer satisfaction and decreased cost, certain parts which may otherwise be replaced during field servicing of the machines, such as belts, bearings, developer loops and image loops, which have limited lives, were also replaced at this time. Pursuant to the flow chart accompanying the submission, the following was performed:
>
> Station 10: Cabinetry was removed and repainted;
>
> Station 20: Major subassemblies were removed, including blowers, chargers, paper supply, and muffler box. These subassemblies are critical to the

function of the paper supply and feeders. Minor subassemblies were also removed. Parts were replaced as required. For example, in the charger assembly, components which were replaced included the corona wires and the grill. Worn-out rollers which start the movement of the image loop around the film core area were also replaced.

Station 30: The mainframe underwent required modifications, and cleaning.

Station 35: Wiring and wiring harnesses were removed and replaced as required.

Station 40: At this station, the main drive was reconditioned, and other work was performed relating to illumination, fuser area core, and the optics subassembly.

Station 45: Cabinetry and feeder were installed and a functional test was performed.

Station 120: Feeder and paper run cabinetry were set up, and after certain other finishing steps were performed, the copiers were packed and sent out for distribution.

The modifications performed on the copiers were as follows:

1) The toning station (toner and developer assembly) was replaced with a new toning station to provide enhanced image quality. The function of the toning assembly is to receive toner from a bottle and pass it on to the image loop for transfer onto the paper on which the image results. Kodak stated that the key components in the older version were a replenisher housing and motor, station sump casting, two developer rollers with two magnet rollers, two mixing blenders and miscellaneous gears, bearings and hardware. The new version had only one developer roller and one magnet roller. It allowed for a different formulation of the developer because the formulation carrier size was reduced in the new version to a much decreased size. Additionally, in the old version, the magnetic properties were soft and not permanent while they were hard and permanent in the new version. Lastly, the developer roller is 200" from the image loop in the older version and .020" in the new version. Kodak stated that these alterations enhance the image quality;

2) Paper level indicators were added to the paper supply drawers which help the customer to determine the amount of paper in each drawer without having to stop the copier while it is running; and

3) An improved latch was added to the document feeder allowing for smoother operation; and

4) New trade dress was applied.

These modifications required certain wiring alterations, which included holes to the mainframe to accommodate the new wiring harnesses, and the reprogramming of six EPROMS. An additional energy saving feature was also added to the software. Kodak stated that with regard to the Optics Assembly, the platen glass was replaced and the illumination housing was repaired but the optics, lens and mirror assemblies were left intact.

Kodak also advised that the roller mechanism around the film core and portions of the charging system was not routinely replaced unless specific parts were worn. The bodies were repaired and the plastics replaced. Further, it was stated that the operations that took place in Mexico did not include any sophisticated calibrations, and those components that were not changed, in addition to the optics and related assemblies previously noted, included the Fuser Frame (Image Fixing), Film Core Structure (Imaging) and Document Feeder Frame (Paper Handling).

Upon completion of the repair and modification operations at the various workstations, the parts, subassemblies, and mainframe were moved to a functional checkout work station where the operator reassembled the copier and performed a complete functional test. Next, the copier went to a quality work station to receive a quality performance test. Lastly, the copier was packed and returned to the U.S. for distribution.

Kodak stated that the partially disassembled copier had unique identifiers so that the parts could be reassembled with matched subassemblies after the reconditioning processes were completed. Therefore, the reassembly process kept together subassemblies which had been "mated" at the time of original manufacture, and no commingling with parts of other copiers took place.

Issue:

Whether the operations performed in Mexico, as described above, constitute "repairs or alterations" under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS).

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides a complete or partial duty exemption for articles returned to the U.S. after having been exported to be advanced in value or improved in condition by means of repairs or alterations. Articles returned to the U.S. after having been repaired or altered in Mexico, whether or not pursuant to warranty, are eligible for duty-free treatment, provided the documentation requirements of section 181.64, Customs Regulations (19 CFR § 181.64), are satisfied. In particular, the documentation required includes a declaration from the person who performed the repairs or alterations, describing the operations performed and the value and cost of such operations, and including a statement that "no substitution whatever had been made to replace any of the goods originally received."

Entitlement to the benefits of subheading 9802.00.50, HTSUS, are precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Tariff treatment under subheading 9802.00.50, HTSUS, is also precluded where the exported articles are incomplete for their intended use prior to the foreign processing. *Guardian*; *Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd*, 66 CCPA 88, C.A.D. 1225, 82, 599 F.2d 1015, 1019 (1979).

In *Press Wireless v. United States*, 6 Cust. Ct. 102, C.D. 438 (1941), the Customs Court held that repairs are operations necessary to restore articles to their original condition, but cannot be so extensive as to destroy the identity of the exported article or create a new or different article. (*See also* 19 CFR § 181.64, which defines "repairs or alterations" as the restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the U.S.).

In previous rulings, we have held that subheading 9802.00.50, HTSUS, will be applicable to articles subject to both partial and complete disassembly, where repairs are made and parts are replaced as long as the essential components and therefore the identify of the article remain intact throughout the repair process. For example, in HRL 554731, dated February 2, 1989, Customs considered fuel injectors which involved the replacement of parts and cleaning after disassembly. Customs determined that the fuel injectors qualified for subheading 9802.00.50, HTSUS, treatment, as long as the adapter and retainer of the fuel injector were not replaced and remained together as a matched set, as these constituted the essential identity of the fuel injector.

In HRL 558858/558859, dated March 11, 1996, Customs considered seven models of used copier "hulks" which were repaired, upgraded, and/or modified in Mexico. In each case, the frame of the "hulk" remained intact, and components such as the wiring harnesses, optics assemblies, printed circuit boards, and other electronic subassemblies remained assembled to the hulk at all times. The operations performed in Mexico involved removing the covers, feeder assembly, fuser, developer houser, xerographic motor, control panel, bypass, platen glass, coroton, copy cartridge, and bypass tray assembly. The covers were sanded and painted, and the platen glass and other non-repairable parts were scrapped. Next, the fuser, developer houser and bypass were sent to subassembly stations for repair. The partially torn-down hulk was then sent to an assembly and repair area where the enabler, low and high voltage power supplies, power cord, main printed wiring board assemblies (pwba) paper size pwba, feeder motor, copy cartridge, counter solenoid, counter, balance spring, half rate cartridge, and front/rear rail were removed, repaired, and reassembled along with the previously removed parts.

During the period of 1992–1993, in HRL 558858/558859, the frames, optics, wiring harnesses, optical control boards, optical drive motor, noise filter, fans, blower, discharge lamp, lower cover base, paper feeder motor, ac driver and sensor pwbas, and the low and high voltage power supplies were removed from the hulk frame during the repair assembly process. However, such parts were identified by bar code, and new parts were either used if required, or the used repaired parts were returned to the same model number. It was found in that case that the essential components of the copiers remained intact throughout the repair process, and did not lose their identify as result of the Mexican operations.

In HRL 558858/558859, the EPROMS contained in the copier's control panel were replaced or reprogrammed so that the copier could perform upgraded tasks, such as operating a noise reduction package or an automatic stapler. In regard to the replacement or

reprogramming of EPROMS, which upgraded the copiers to conform to current industry standard, Customs determined that this did not change the identify of the exported articles, but rather improved the product and advanced its value. Accordingly, Customs found in that case that the copiers qualified for subheading 9802.00.50, HTSUS, treatment.

We note that in HRL 558858/558859, Customs stated that subheading 9802.00.50, HTSUS, is applicable to articles subject to both partial and complete disassembly, where parts are replaced, as long as the essential components and therefore the identity of the article remains intact throughout the repair operation. As determined in HRL 558858/558859, the copiers were found not to have lost their identity as a result of the foreign operations. We note that in HRL 555819, dated October 11, 1991, it was stated that the replacement and/or addition of parts to restore products to their original condition may constitute repair operations for purposes of subheading 9802.00.50, HTSUS, if the particular article does not lose its identity and the replacements and/or additions are not so extensive as to create a new or different article. In HRL 555117, dated December 22, 1988, the essential components were also required to be tagged as a matched set.

On the issue of enhanced copier quality, we note that the Court in *Royal Bead Novelty Co., Inc. v. United States*, 68 Cust. Ct. 154, C.D. 4353 (1972) and Customs in HRL 559648 dated May 20, 1996, concluded that a change in the quality of an article resulting from further processing does not preclude application of 9802.00.50. *See also* HRL 557024 dated June 30, 1993 (involving the enhancement of stock computers in Canada), HRL 560245 dated April 4, 1997 (installation of Mobile satellite communications tracking system on trucks in Canada).

It was claimed that the heart of an electrophotographic copier is the electrophotographic process used. The various models shared the same photoconductor (film loop), toner and developer concept (dual component), as well as the erase, cleaning, charging, exposure and optics system. Only the transfer and scavenging systems and the development process were modified. Measured against the 50 imaging attributes for these named sub-assemblies identified, it was claimed that the five changes mentioned are minor. The overwhelming majority of these characteristics, if they are handled at all (and only about 50 percent on average of any given copier is subject to repair and alteration) while the copier underwent modification, as claimed, were simply repaired during the refurbishing process. It is stated that the few alterations which were made are minor and did not change the essential nature of the electrophotographic process, paper handling, document handling or user interface systems or indeed even the structure of the original machine. Some of the changes were made at the plant for convenience rather than later at the customer's premises, for example, the upgrades which involved the PACT, the cleaning station assembly, the 15 volt power supply and the replacement of carbon fiber brushes with stainless steel antistatic brushes.

We note that under Additional Note 5, Chapter 90, HTSUS, copier assemblies are grouped as follows: (a) Imaging assemblies; (b) Optics assemblies; (c) User control assemblies; (d) Image fixing assemblies; (e) Paper handling assemblies; and (f) Combination of the above specified assemblies. In our opinion, the order of the listed assemblies, (a) through (e), reflected in U.S. Note 5, is indicative of their significance to the copier. We note that the major components of a typical high-volume photocopier include the photoconductor, a primary charger, and systems for exposure, toning, transfer, erasing, and cleaning. *McGraw Hill Encyclopedia of Science & Technology*, Vol. 13 (1987). We also note that cartridges and developer, fuser rollers and oil, the photoconductor belt, and cleaning brush are consumables which are replaced approximately every 300,000 copies (except for the cartridges which are replaced about every 10,000 copies). Therefore, for purposes of our determination of eligibility for subheading 9802.00.50, HTSUS, treatment, we have focused upon the effect of the operations performed abroad upon the above copier assemblies.

The drum is the "heart" of the copier and almost every step involved with making a copy takes place around the drum. *Kuaimoku, Photocopier Maintenance and Repair Made Easy (1st Ed. 1994)*. There are eight main steps in the copy process, all of which involve the imaging assemblies: (1) charging, (2) exposing, (3) developing, (4) transferring, (5) separating, (6) fusing, (7) cleaning, and (8) erasing. The charging corona unit applies the charge on the drum. The exposing step illuminates the document and projects the image on the drum and involves the platen glass, exposure lamp, reflectors, aperture, and manual exposure control. Also involved in exposure is the projection of the image onto the

drum's surface which involves the mirrors, scanner carriage, solid lens and drums of the optical system. The developer section involves the developer (toner and carrier mix); bucket roller; magnetic roller, bias circuit, toner-carrying screw, and developer section body. The transfer step removes the toner image from the drum and places it onto the copy paper by applying a strong electrical charge from the transfer corona to the back side of the copy paper.

With regard to the Model C to D process in the instant case, Customs found in HRL 560006 that installing a new toner and developer assembly, which produces a superior print quality, and a new primary charger, were significant changes to the imaging assemblies, which along with other changes in the paper handling assembly (paper level indicators), changed the copier's essential identity.

It is now Customs view that the essential identity of the copiers was retained when processed in Mexico and partially disassembled. The review of the facts of the case indicate that among the major features which remained attached to the copier at all times were the mechanical frame, casters and wheel systems, film core, drive train, wire harnesses, noise filters, and logic and control units. Various minor features remained attached as well. It was stated that Kodak tracked which parts and subassemblies were removed from a given carcass through the use of unique inventory control numbers. As a result, parts could be reassembled with matched subassemblies after the reconditioning process.

With regard to the Model C to D process, the difference between the toner and developer assembly of the Model C and Model D, resulted in a more efficient presentation of the toner to the latent image. It is clear that many of the replaced parts were parts that can be serviced in the field, and that they are more akin to what we would consider to be "consumables", or parts that wear out with time and need to be repaired or replaced to ensure the continued functioning of the photocopier.

The processing involving the charger, developer and optics assembly in the instant case was one in which many of the parts were replaced due to normal wear. For instance the worn-out rollers in the charger assembly was replaced. Counsel noted that the roller mechanism around the film core and portions of the charging system were not routinely replaced unless specific parts were worn. In the optics assembly, the platen glass was replaced and the illumination housing was repaired. However, the optics, lens, and mirror assemblies were left intact. Fuser Frame (Imaging Fixing), Film Core Structure (Imaging) and Document Feeder Frame (Paper Handling) were not changed.

A change that did occur was the toning assembly where the key components in the older version—replenisher housing and motor, station sump casting, two developer rollers with two magnet rollers, two mixing blenders along with miscellaneous gears, bearings, and hardware were replaced with a new version having one developer roller and one magnet roller.

This processing of the two assemblies which are noted above as the two most important assemblies in a photocopier are in our view not ones which suffice as altering the essential character of the copier. Although certain parts of these assemblies were replaced, the processing did not destroy the essential character of the copier. As we noted in HRL 555819, replacement and/or addition of parts that are not so extensive as to create a new or different article constitutes acceptable repair operations for purposes of subheading 9802.00.50, HTSUS. Also, as mentioned in HRL 558858/558859, subheading 9802.00.50, HTSUS, is applicable to articles subject to partial and/or complete disassembly as long as the essential components and the identity of the article remain intact.

Accordingly, with regard to the Model C to D process, it is now our opinion that, although the processing involved extensive reconditioning of numerous parts and replacement of a number of parts resulting in an enhancement of certain copier functions, the changes were not so extensive as to destroy the essential identity of the exported photocopier or create a new or commercially different article. Furthermore, the fact that many of the parts are identified as being able to be replaced in the field, indicates that the replacement of such parts restore the products to their original condition and, therefore, may be considered "repairs" within the meaning of subheading 9802.00.50, HTSUS.

Holding:

On the basis of the information submitted, it is our opinion that the Mexican operations enumerated above with regard to the Model C to D conversion operations constitute "repairs or alterations" since they did not destroy the identity of the exported copiers or create new or commercially different articles. Therefore, the imported Model D copiers which were exported as Model C copiers are eligible for the full duty exemption under sub-

heading 9802.00.50, HTSUS. Consistent with this ruling, HRL 560006, dated March 21, 1997, is hereby revoked.

CRAIG A. WALKER,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2003.
CLA–2 RR:CR:SM 562516 TJM
Category: Classification
Tariff No. 9802.00.50

PORT DIRECTOR
U.S. CUSTOMS SERVICE
610 West Ash Street
San Diego CA 92188

Re: Revocation of HRL 559672; 9802.00.50 treatment to photocopiers; Kodak; essential identity; repair and alteration; 19 USC 1625(c).

DEAR PORT DIRECTOR:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter ("HRL") 559672, dated December 17, 1996, addressed to you, concerning the classification and eligibility of photocopiers exported to Mexico from the U.S. and returned for duty exemption provided under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS). After review of this ruling, we have determined that the operations in Mexico performed on certain Kodak copiers ("Model F") resulting in "Model D" qualify as "repairs or alterations" as provided under 9802.00.50, HTSUS. For the reasons that follow, this ruling revokes HRL 559672.

Facts:

In Headquarters Ruling Letter ("HRL") 559672, dated December 17, 1996, the facts indicate that Kodak exported used model F copier-duplicators to Mexico, performed various processes to these copiers, and imported model D copier-duplicators to the U.S. It is claimed that the processes performed in Mexico were "repairs or alterations" and that the returned articles qualified for duty-free entry under subheading 9802.00.50, HTSUS. Before describing the processes performed to make a model F into a model D, counsel stated that the processes performed were similar to those performed in converting a model B to a model D, which in turn are similar to the processes performed on a model B when it became a model C, and which involve those operations performed to the model B when it remained a model B.

The model B processes performed when there was no change in model number involved disassembling the copiers, cleaning them, and replacing worn parts. It was also stated that if there was an engineering enhancement, newer model parts were installed to replace old and outdated ones. The disassembled subassemblies were routed through subassembly work stations with unique identifiers so that the repaired subassemblies could be installed into the same copier during the reconditioning phase. According to counsel, the Mexican plant did not perform optical alignments; therefore, the reassembly process kept subassemblies together which had been mated at the time of original manufacture. The copier underwent a set-up and test process and the cabinetry was reinstalled. It was alleged that the reconditioned model B copier was returned to the U.S. without change to its essential components (the image capture system (lenses and film handling assembly)). Both of the copiers were stated to be referred to as "indirect process electrophotostatic copiers," and six Erasable Programmable Read-Only Memory chips ("EPROMS") were erased and reprogrammed to accommodate updated operating instructions.

Next, counsel presented the processes performed to convert a model B to a model C. It was stated that none of the operations sped up the photocopier or altered the type or size of

paper the copier is able to process. Speed and paper size and type were stated by protestant to be the criteria in the marketplace to determine whether or not a copier has been upgraded. The only features which appeared on the model C which did not appear on the model B were the specific document feeder and the Pressure Assist Corona Transfer (PACT). The document feeder incorporated a semi-automatic positioning feature. The PACT modification kept the paper flatter as it works its way through the imaging process but allegedly did not change the copier's function. When the document feeder was installed, it required a modification to the static eliminator harness in the duplex tray and the positioner interlock harness in the cabinetry as the remaining internal space was diminished. As a result, a new wire harness was inserted to make the static eliminator smaller.

Counsel also stated that new circuit boards were substituted whether or not the processes resulted in a change in model number. However, model C required different circuit boards. The existing EPROMS as reprogrammed and the input/output boards were modified by soldering an additional wire which allowed the machine to operate either as a model B or a model C. The EPROMS reprogramming supposedly arose to accommodate the new document feeder.

Counsel stated that the additional steps taken which resulted in a model D from a model F were that the model F toning station was replaced with a new toning station which enhanced the image quality. The paper level indicators were added to the paper supply drawers to help customers determine the amount of paper in each supply drawer without having to stop copier operations. An upgraded trimodal document feeder was installed including an improved latch to allow for smoother operation. There was also a new trade dress.

In addition, counsel stated that there were a few minor steps added to the normal reconditioning process. Holes were added to the mainframe to accommodate new harnesses. There was also the installation of a reprogrammed set of six EPROMS to allow the software to relate to all of the new functions, plus an additional energy saving feature was added to the software. The principle differences stated by counsel between the model F to model D process (the subject of this request), and the model B to model D process was that the paper supply was modified to allow for automatic duplexing which resulted in the addition, as well, of a duplex tray and the inclusion of duplex paper path assemblies; the copier speed was enhanced from 70 to 85 copies per minute by the replacement of three sprockets and a chain; and a noise reduction was achieved through the addition of a muffler in the vacuum system and a damper from the paper stop gate.

In addition, counsel stated that some additional steps occurred during conversion of model F to model D. The registration assembly was altered to accommodate the addition of the PACT. Four new subassemblies were added to the new model configuration: document positioner hopper, paper supply cover, wireform and duplex tray. In the Logic and Control Unit, the EPROMS were erased and reprogrammed with the latest version of software, including an energy saving feature that puts the copier in stand-by mode. A 5-Volt regulator was also added for the stepper control circuitry. The developer station was replaced with a new high definition grain station which allows for superior image quality.

The Scuff bimodal document feeder was replaced with a new trimodal document feeder that incorporated a semi-automatic positioner. The copier main harness was replaced in order to accommodate the model D features. Components, such as the main drive motor sprocket, clutch and developer drive sprocket assembly were replaced to speed up the copier's performance. The vacuum system was also modified to incorporate the ability to automatically duplex, accommodate heavier paper sizes, and reduce noise levels through the addition of a muffler.

The chart of the model F to model D process indicated that in regard to the Imaging Assemblies, the film belt and worn components were replaced, and a new LED erase bar was installed in the photoreceptor belt and handling assembly; a new toner and developer assembly was installed; worn components were replaced in the charging assemblies; and an upgraded cleaning housing was added and a new scavenger was installed in the cleaning assembly.

On November 27 and December 6, 1996, counsel provided additional explanations of certain operations in response to our request. It was stated that the IQE station slider, plenum assembly build, backup slider assembly, and assembly drive roller were the worn components that were replaced in the photoreceptor belt and handling assembly. The IQE station slider basically allows the developer assembly to be removed from the machine

without disassembling the machine. The new model of the plenum assembly build installed into model D photocopiers used hoses and ducts instead of magnets to collect excess toner flakes and developer from the film loop. The backup slider assembly moves the image loop toward the developer roller when actuated. The assembly drive roller starts the movement of the image loop around the film core area, and it was stated that worn out rollers were replaced and the same rollers were used regardless of the resulting finished model.

In regard to the charging assemblies, the information received on December 6, 1996, indicated that the worn components replaced were those which naturally wear out during normal copier operations, such as the corona wires (provides the charge to the image loop), the primary (gives off the charge), and the grill (takes the charge from the corona wire and disburses it over the loop).

In regard to the toner and developer assembly, it was indicated that the major parts were a toner container, replenisher, developer, and magnet rollers, a gear box, sump casting and drive shaft plus a toner concentration monitor and miscellaneous gears, bearings and hardware. In some instances, it was stated that a scavenger is present. It was stated that the configuration and number of changes depended on the specific finished copier model involved and that the function of the toner and developer assembly was to receive toner from a bottle and pass it to the image loop for transfer onto the paper on which the image results.

In regard to the cleaning housing, the information received on December 6, 1996, indicated that its function is to eliminate contamination on the film path, and that its major part is a casting. The model F casting was plastic, while the model D casting is aluminum. In regard to the LED erase bar, it was indicated that it erases residual information on the image loop between copies.

In regard to the Optics Assemblies, the chart indicated that the platen glass was replaced and a new platen frame was installed in the platen glass and illumination housing; and worn components were replaced in the lens/mirror assembly. The information received on December 6, 1996, indicated that the worn components replaced in the lens/mirror assembly were mechanical ones, such as the timing belts and pulleys which slide the lens assembly on its guides by means of a high precision motor during the imaging process. It was also stated that if a lens/mirror was scratched or broken, the lens or mirror itself was replaced.

In regard to the User Control Assemblies, the chart indicated that worn components and a new display panel with a new color scheme were replaced in the operator control panel assembly. In regard to the Image Fixing Assemblies, the fuser and pressure roller and worn components were replaced in the fusing assembly.

In regard to the Paper Handling Assemblies, the chart indicated that a new document feeder/positioner assembly was made reusing some components, which incorporated an automatic duplexing and semi-automatic positioning feature; a new paper supply assembly was made reusing some components and an improved feeding system and paper level indicators were installed; worn components, PACT modification, and a multifeed detection was added to the registration assembly; a new duplex paper path assembly was added; worn components and the vacuum and upper transports were replaced in the transport assemblies; worn components were replaced in the vacuum system, and heavy duty blowers were converted to handle heavy weight paper, valves were replaced for automatic duplexing, and a muffler was installed to reduce noise. The information received December 6 indicated that shafts, rollers, wire forms, solenoids, and sensors (in the duplex tray) were replaced in the transport assemblies.

In regard to the logic and control unit, the chart indicated that the EPROMS were reprogrammed; the control unit was modified; and a stepper control was added to accommodate automatic duplexing. Additionally, change occurred to the color scheme, the top cover was modified, and a tray assembly and side hopper were installed to accommodate the positioner. Pulleys and sprockets were replaced to speed up the unit from 70 to 85 copies per minute.

As indicated above, the scavenger was replaced in the cleaning assembly with one of a more efficient design. In a letter dated December 21, 1994, counsel explained that the scavenger system is designed to remove any residual toner or carrier left on the image medium. Its purpose is to make clearer copies. At the time the letter was written, it was indicated that due to design flaws the new scavenger system was not used.

Since counsel noted that the processes in making a model D were similar to those in making a model C, your office's concerns over the model B to model C processes are noted. Your office stated that the model B did not possess the necessary mechanical hardware, circuitry, document positioner, tri-modal feeder, auto-sizing capabilities, PACT and programming required for the model C to exist. Your office stated that the model B was known as a copier-duplicator, while the model C was known as an offset copier-duplicator. The model C's tri-modal feeder takes normal paper weights and sizes automatically through the recirculating feeder, or it copies odd size and weight originals through the semi-automatic positioner, or it allows for manual copying. The auto-sizing capabilities reduce the image size of the original to fit the selected paper supply, and it is capable of offset stacking.

Issue:

Whether the conversion of Kodak "Model F" copiers to a Kodak "Model D" copiers constituted "repairs or alteration" under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS).

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides a complete or partial duty exemption for articles returned to the U.S. after having been exported to be advanced in value or improved in condition by means of repairs or alterations. Articles returned to the U.S. after having been repaired or altered in Mexico, whether or not pursuant to warranty, are eligible for duty-free treatment, provided the documentation requirements of section 181.64, Customs Regulations (19 CFR § 181.64), are satisfied. In particular, the documentation required includes a declaration from the person who performed the repairs or alterations, describing the operations performed and the value and cost of such operations, and including a statement that "no substitution whatever had been made to replace any of the goods originally received."

Entitlement to the benefits of subheading 9802.00.50, HTSUS, are precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States*, 44 CCPA 27, C.A.D. 631 (1956); *Guardian Industries Corp. v. United States*, 3 CIT 9 (1982). Tariff treatment under subheading 9802.00.50, HTSUS, is also precluded where the exported articles are incomplete for their intended use prior to the foreign processing. *Guardian*; *Dolliff & Company, Inc. v. United States*, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd*, 66 CCPA 88, C.A.D. 1225, 82, 599 F.2d 1015, 1019 (1979).

In *Press Wireless v. United States*, 6 Cust. Ct. 102, C.D. 438 (1941), the Customs Court held that repairs are operations necessary to restore articles to their original condition, but cannot be so extensive as to destroy the identity of the exported article or create a new or different article. (*See also* 19 CFR § 181.64, which defines "repairs or alterations" as the restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the U.S.).

In previous rulings, we have held that subheading 9802.00.50, HTSUS, will be applicable to articles subject to both partial and complete disassembly, where repairs are made and parts are replaced as long as the essential components and therefore the identify of the article remain intact throughout the repair process. For example, in HRL 554731, dated February 2, 1989, Customs considered fuel injectors which involved the replacement of parts and cleaning after disassembly. Customs determined that the fuel injectors qualified for subheading 9802.00.50, HTSUS, treatment, as long as the adapter and retainer of the fuel injector were not replaced and remained together as a matched set, as these constituted the essential identity of the fuel injector.

In HRL 558858/558859, dated March 11, 1996, Customs considered seven models of used copier "hulks" which were repaired, upgraded, and/or modified in Mexico. In each case, the frame of the "hulk" remained intact, and components such as the wiring harnesses, optics assemblies, printed circuit boards, and other electronic subassemblies remained assembled to the hulk at all times. The operations performed in Mexico involved removing the covers, feeder assembly, fuser, developer houser, xerographic motor, control panel, bypass, platen glass, coroton, copy cartridge, and bypass tray assembly. The covers were sanded and painted, and the platen glass and other non-repairable parts were scrapped. Next, the fuser, developer houser and bypass were sent to subassembly stations for repair. The partially torn-down hulk was then sent to an assembly and repair area where the enabler, low and high voltage power supplies, power cord, main printed wiring board

assemblies (pwba) paper size pwba, feeder motor, copy cartridge, counter solenoid, counter, balance spring, half rate cartridge, and front/rear rail were removed, repaired, and reassembled along with the previously removed parts.

During the period of 1992–1993, in HRL 558858/558859, the frames, optics, wiring harnesses, optical control boards, optical drive motor, noise filter, fans, blower, discharge lamp, lower cover base, paper feeder motor, ac driver and sensor pwbas, and the low and high voltage power supplies were removed from the hulk frame during the repair assembly process. However, such parts were identified by bar code, and new parts were either used if required, or the used repaired parts were returned to the same model number. It was found in that case that the essential components of the copiers remained intact throughout the repair process, and did not lose their identify as result of the Mexican operations.

In HRL 558858/558859, the EPROMS contained in the copier's control panel were replaced or reprogrammed so that the copier could perform upgraded tasks, such as operating a noise reduction package or an automatic stapler. In regard toe the replacement or reprogramming of EPROMS, which upgraded the copiers to conform to current industry standard, Customs determined that this did not change the identify of the exported articles, but rather improved the product and advanced its value. Accordingly, Customs found in that case that the copiers qualified for subheading 9802.00.50, HTSUS, treatment.

We note that in HRL 558858/558859, Customs stated that subheading 9802.00.50, HTSUS, is applicable to articles subject to both partial and complete disassembly, where parts are replaced, as long as the essential components and therefore the identity of the article remains intact throughout the repair operation. As determined in HRL 558858/558859, the copiers were found not to have lost their identity as a result of the foreign operations. We note that in HRL 555819, dated October 11, 1991, it was stated that the replacement and/or addition of parts to restore products to their original condition may constitute repair operations for purposes of subheading 9802.00.50, HTSUS, if the particular article does not lose its identity and the replacements and/or additions are not so extensive as to create a new or different article. In HRL 555117, dated December 22, 1988, the essential components were also required to be tagged as a matched set. The regulatory requirements of not destroying the identity of the exported articles, however, are clear. Court decisions pertaining to this statute also set forth this requirement; however, none of the decisions appear to have addressed complex machinery and extensive parts replacement.

On the issue of enhanced copier quality, we note that the Court in *Royal Bead Novelty Co., Inc. v. United States*, 68 Cust. Ct. 154, C.D. 4353 (1972) and Customs in HRL 559648 dated May 20, 1996, concluded that a change in the quality of an article resulting from further processing does not preclude application of 9802.00.50. *See also* HRL 557024 dated June 30, 1993 (involving the enhancement of stock computers in Canada), HRL 560245 dated April 4, 1997 (installation of Mobile satellite communications tracking system on trucks in Canada).

We note that under Additional Note 5, Chapter 90, HTSUS, copier assemblies are grouped as follows: (a) Imaging assemblies; (b) Optics assemblies; (c) User control assemblies; (d) Image fixing assemblies; (e) Paper handling assemblies; and (f) Combination of the above specified assemblies. In our opinion, the order of the listed assemblies, (a) through (e), reflected in U.S. Note 5, is indicative of their significance to the copier. We note that the major components of a typical high-volume photocopier include the photoconductor, a primary charger, and systems for exposure, toning, transfer, erasing, and cleaning. *McGraw Hill Encyclopedia of Science & Technology*, Vol. 13 (1987). We also note that cartridges and developer, fuser rollers and oil, the photoconductor belt, and cleaning brush are consumables which are replaced approximately every 300,000 copies (except for the cartridges which are replaced about every 10,000 copies). Therefore, for purposes of our determination of eligibility for subheading 9802.00.50, HTSUS, treatment, we have focused upon the effect of the operations performed abroad upon the above copier assemblies.

The drum is the "heart" of the copier and almost every step involved with making a copy takes place around the drum. *Kuaimoku, Photocopier Maintenance and Repair Made Easy (1st Ed. 1994)*. There are eight main steps in the copy process: (1) charging, (2) exposing, (3) developing, (4) transferring, (5) separating, (6) fusing, (7) cleaning, and (8) erasing. The charging corona unit applies the charge on the drum. The exposing step illuminates

the document and projects the image on the drum and involves the platen glass, exposure lamp, reflectors, aperture, and manual exposure control. Also involved in exposure is the projection of the image onto the drum's surface which involves the mirrors, scanner carriage, solid lens and drums of the optical system. The developer section involves the developer (toner and carrier mix); bucket roller; magnetic roller, bias circuit, toner-carrying screw, and developer section body. The transfer step removes the toner image from the drum and places it onto the copy paper by applying a strong electrical charge from the transfer corona to the back side of the copy paper.

With regard to the Model F to D process in the instant case, Customs ruled in HRL 559672 that replacing the toner and developer assembly, installing a new LED erase bar, and adding an upgraded cleaning housing and a new vacuum scavenger in the cleaning assembly were significant changes to the imaging assemblies, which along with other changes in the paper handling assembly (paper level indicators), changed the copier's essential identity.

With regard to the Model F to D process, the difference between the toner and developer assembly and cleaning/erase assemblies of the Model F and Model D, as well as the changes to the bias voltage, magnetic roller, LED erase bar, and vacuum scavenger, result in a more efficient presentation of the toner to the latent image.

For instance, in the imaging assemblies, the processing included the replacement of the film belt and worn components. A new LED erase bar was installed in the photoreceptor belt. It is stated that the IQE station slider, plenum assembly build, backup slider assembly, and assembly driver roller were the worn components that were replaced in the photoreceptor belt and handling assembly. The IQE station slider basically allows the developer assembly to be removed from the machine without disassembling the machine. The new model of the plenum assembly build installed into the model D uses hoses and ducts instead of magnets to collect excess toner flakes and developer from the film loop. The backup slider assembly moves the image loop toward the developer roller when actuated. The assembly driver roller starts the movement of the image loop around the film core area, and it is stated that worn out rollers were replaced and the same rollers are used regardless of the resulting finished model.

In regard to the charging assemblies, the information received on December 6, 1996, indicated that the worn components replaced were those that naturally wear out during normal copier operations, such as the corona wires (provides the charge to the image loop), the primary (gives off the charge), and the grill (takes the charge from the corona wire and disburses it over the loop).

Regarding optics assemblies, the platen glass was replaced and worn components were replaced in the lens/mirror assembly. The worn components include mechanical parts such as timing belts and pulleys which slide the lens assembly on its guides.

This processing of the two assemblies which are noted above as the two most important assemblies in a photocopier are in our view not ones which suffice as altering the essential identity of the copier. Although certain parts of these assemblies are replaced, the processing does not destroy the essential identity of the copier. As we noted in HRL 555819, replacement and/or addition of parts that are not so extensive as to create a new or different article constitutes repair operations for purposes of subheading 9802.00.50, HTSUS. Also, as mentioned in HRL 558858/558859, subheading 9802.00.50, HTSUS, is applicable to articles subject to partial and/or complete disassembly as long as the essential components and the identity of the article remain intact.

Accordingly, with regard to the Model F to D process, it is now our opinion that, although the processing involved extensive reconditioning of numerous parts and replacement of a number of parts resulting in an enhancement of certain copier functions, the changes were not so extensive as to destroy the essential identity of the exported photocopier or create a new or commercially different article. Furthermore, the fact that many of the parts are identified as being able to be replaced in the field, indicates that the replacement of such parts restore the products to their original condition and, therefore, may be considered "repairs" within the meaning of subheading 9802.00.50, HTSUS. The partial disassembly, also consistent with HRL 558858/558859 does not disqualify the application of 9802.00.50, HTSUS, to the instant case.

Holding:

On the basis of the information submitted, it is our opinion that the Mexican operations enumerated above with regard to the conversion of Model F to D constitute "repairs or alterations" since they did not destroy the identity of the exported copiers or create new or

commercially different articles. Therefore, the imported Model D copiers are eligible for the full duty exemption under subheading 9802.00.50, HTSUS. Consistent with this ruling, HRL 559672, dated December 16, 1996, is hereby revoked.

CRAIG A. WALKER,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF SANDBOX COVERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letters and treatment relating to the classification of sandbox covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS"), of sandbox covers. Similarly, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before February 28, 2003.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, DC, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Bornstein, General Classification Branch, (202) 572–8786.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "in-

formed compliance" and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two ruling letters pertaining to the tariff classification of sandbox covers. Although in this notice Customs is specifically referring to two rulings, Headquarters Ruling Letter ("HQ") 961120, dated October 14, 1998, and New York Ruling Letter ("NY") I81451, dated May 22, 2002, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In HQ 961120, dated October 14, 1998, ("Attachment A"), Customs classified a sand box cover in subheading 9503.90.00, HTSUS, as "[o]ther toys; reduced-size ("scale") models and similar recreational

models, working or not; puzzles of all kinds; parts and accessories thereof: [o]ther: [p]arts and accessories." In NY I81451, dated May 22, 2002, ("Attachment B"), Customs classified another sandbox cover in subheading 6307.90.98, HTSUS, as "[o]ther made up articles * * *: Other: Other[.]" Since the issuance of these rulings, Customs has had a chance to review the classification of this merchandise and has determined that these classifications are in error.

It is now Customs position that the subject sandbox covers are classifiable in subheading 9506.99.60, HTSUS, which provides for "[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: * * * Other: * * * Other[.]"

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke HQ 961120 and NY I81451, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letters 966135 and 966140 (*see* "Attachments C and D," respectively, to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: January 14, 2003.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 14, 1998.

CLA–2 RR:CR:GC 961120 MMC
Category: Classification
Tariff No. 9503.90.0070

MR. WILLIAM C. NEAL
THE LITTLE TIKES COMPANY
2180 Barlow Road
Hudson, OH 44236

Re: Sun Canopy; Accessory to the "Sun & Shade Sandbox".

DEAR MR. NEAL:

This is in reference to your October 15, 1996, letter to the Director, Customs National Commodity Specialist Division, New York, requesting a binding classification for a sun canopy under the Harmonized Tariff Schedule of the United States (HTSUS). Company literature depicting the article as well as a sample was submitted with your request. Your letter was referred to this office for reply. We regret the delay in responding.

Facts:

The article is designated as item 682570000. It is a sun canopy constructed of either nylon or polyester woven fabric. It measures approximately 40 inches by 42 inches and has rounded corners. The canopy has a metal strip sewn into its edges which shapes it. Four textile fabric tabs are sewn onto the edges to facilitate the canopy's attachment to the top of the plastic posts of the "Sun & Shade Sandbox." The fabric tabs have had hemmed holes cut in them which are slipped into complementary plastic buttons on the plastic posts. This secures the canopy to the top of the posts and creates a cover which shields children playing in the sandbox. When the sandbox is not in use, the canopy is removed from the top of the posts and attached to the base of the box to act as a protective cover from the elements.

After importation, the canopy will be combined with item number 4850 "Sun & Shade Sandbox." This combination is then shipped to various retail outlets.

Issue:

Whether the canopies are accessories to sandboxes.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

In Bauerhin Technologies Ltd. Partnership v. U.S. 110 F.3d 774 (Fed.Cir. 1997), (hereinafter Bauerhin) the United States Court of Appeals for the Federal Circuit held that canopies for infant car seats which were solely dedicated for use with child safety seats, and were neither designed nor sold to be used independently, were properly classified as parts of car seats. Like the canopies in Bauerhin, these canopies are solely dedicated for use with the sandboxes, and are not designed nor sold to be used independently. As such, they have the potential for being considered a part of the sandbox for tariff purposes, if the sandbox is classifiable under a heading which provides a subheading for parts and accessories.

We are of the opinion that the sandboxes are classifiable as toys. Heading 9503, HTSUS, provides for [o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.

The term "toy" is not defined in the HTSUS. However, in understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89–90, 54 FR 35127, 35128 (August 23, 1989).

The ENs to Chapter 95, HTSUS, state, in pertinent part, that "[t]his Chapter covers toys of all kinds whether designed for the amusement of children or adults." Although not set forth as a definition of "toys," we have interpreted the just-quoted passage from the ENs as equating "toys" with articles "designed for the amusement of children or adults," although we believe such design must be corroborated by evidence of the articles' principal use.

The physical characteristics of the sandbox indicate that it is classifiable as a toy. While it has a container component, holding sand, it holds that sand so that children may play in and with it. Such play indicates that the article has a significant amount of manipulative play value. In addition, the sandbox is not the usual container used for packing and storing sand. Finally, these sandboxes are sold in the toy channel of trade, not that for construction or household wares. All of these factors indicate that the sandboxes are classifiable in heading 9503, HTSUS. As the canopies are parts of the sandboxes they are classifiable under subheading 9503.90.0070, HTSUS, which provides for other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:[o]ther: [p]arts and accessories.

Holding:

The sun canopies are classifiable under subheading 9503.90.0070, HTSUS, which provides for [o]ther toys; reduced-size ("scale") models and similar recreational models,

working or not; puzzles of all kinds; parts and accessories thereof:[o]ther: [p]arts and accessories. The applicable rate of duty is free.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 22, 2002.

CLA-2-63:RR:NC:TA:351 I81451
Category: Classification
Tariff No. 6307.90.9889

MS. HOPE BAILEY
SCHENKER, INC.
1300 Diamond Springs Road
Suite 300
Virginia Beach, VA 23455

Re: The tariff classification of a sandbox cover from Hong Kong.

DEAR MS. BAILEY:

In your letter dated May 8, 2002, on behalf of The Little Tikes Company, you requested a tariff classification ruling.

The sample submitted is a sandbox cover made of man-made textile panels. The panels are sewn together and designed to fit a sandbox. The edges are hemmed. Sewn into each corner is an elastic fabric. Attached onto one side, at set intervals, are textile web fabric straps. Depicted onto one side is a design with the printed words "Little Tikes."

The applicable subheading for the sandbox cover will be 6307.90.9889, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * Other. The rate of duty will be 7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646-733-3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 966135 BJB
Category: Classification
Tariff No. 9506.99.60

MR. WILLIAM C. NEAL
THE LITTLE TIKES COMPANY
2180 Barlow Road
Hudson, OH 44236

Re: Proposed Revocation of HQ 961120; Sandbox covers.

DEAR MR. NEAL:

On October 14, 1998, this office issued you Headquarters Ruling Letter (HQ) 961120, classifying a "sandbox canopy and cover" under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 9503.90.00, HTSUS, as "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: [o]ther: [p]arts and accessories[.]"

We have reviewed the ruling in HQ 961120, and have determined the classification to be incorrect. This ruling revokes HQ 961120 and sets forth the correct classification.

Facts:

The merchandise is identified as a sun canopy and cover for a sandbox, model #682570000 (sandbox cover), made for use with the "Sun & Shade Sandbox," model #4850. The sandbox cover is made of "either nylon or polyester woven fabric" measuring approximately 40-inches by 42-inches. The cover has four textile fabric tabs, each with a hemmed hole, to secure the cover to plastic buttons attached at the tops of the sandbox's four posts.

The cover is designed to provide shade as a canopy when the sandbox is in use, and protective cover, attached to the base of the sandbox, when it is not.

Issue:

Whether the sandbox cover is classifiable under heading 9503, HTSUS, as "[o]ther toys; * * *; parts and accessories thereof[;]" heading 9506, HTSUS, as "outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[;]" or elsewhere in the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under General Rule of Interpretation (GRI) 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS (2003) provisions under consideration are as follows:

6307	Other made up articles, including dress patterns:
6307.90	Other:
6307.90.98	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90	Other
* * * * * * *	

9506		Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
		Other:
9506.99		Other:
9506.99.60		Other

* * * * * * *

An article is to be classified according to its condition as imported. *See XTC Products, Inc. v. United States*, 771 F. Supp. 401, 405 (1991). *See also United States v. Citroen*, 223 U.S. 407 (1911). In its condition, as imported, the subject good is a sandbox cover made of nylon or polyester fabric.

At GRI 1, heading 6307, HTSUS, provides for "[o]ther made up articles, including dress patterns[.]" However, Note 1(t) to Section XI, (which covers heading 6307, HTSUS), provides that the section does not cover: "[a]rticles of chapter 95 (for example, toys, games, sports requisites and nets)[.]" Therefore, if the sandbox cover is a good classifiable under heading 9503, or 9506, HTSUS, it cannot be classifiable under Chapter 63, HTSUS.

Heading 9503, HTSUS, provides for, in pertinent part, "[o]ther toys * * *; parts and accessories thereof[,]" and heading 9506, HTSUS, provides for, in pertinent part, "[a]rticles and equipment for * * * other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[.]"

Since articles and equipment for outdoor playground games provide some amusement, the issue is whether or not the sandbox provides the "amusement" and "play" of an "other toy" described in heading 9503, HTSUS. The determination of whether the sandbox (model 4850), for which the subject cover is designed, is classifiable as an "other toy" or as an "outdoor game," is not *prima facie* clear.

In HQ 961120, the issue before Customs was whether the subject sandbox cover was an accessory to a sandbox. Customs determined that the cover was classifiable in heading 9503, HTSUS, which provides for, in pertinent part, "parts or accessories" of "[o]ther toy[s.]" The sandbox, as *dicta*, was classified in heading 9503, HTSUS, as an "[o]ther toy[.]"

With regard to heading 9503, HTSUS, the term "toy" is not specifically defined in the tariff, or the ENs. The ENs to Chapter 95, HTSUS, provide that: "this chapter covers toys of all kinds whether designed for the amusement of children or adults."

It is Customs position that a toy is essentially a plaything, something that is intended and designed for the amusement of children or adults, and which by its very nature and character is reasonably fitted for no other purpose. Customs views the "amusement" requirement as indicating that toys should be designed and used principally for amusement and that they not serve a **utilitarian purpose.** *See* Additional U.S. Rule of Interpretation 1(a), HTSUS. Further, Customs defines "principal use" as that use which exceeds each other single use of the article.

A sandbox is designed to hold sand in a prescribed area and provide a play environment for children's playground games. A sandbox itself does not provide the manipulative play value or frivolous amusement characteristic of toy playthings. In this case, children play with the sand in the sandbox, they do not play with the sandbox. Any amusement derived from playing in the sandbox, *e.g.*, from its shape, digging in the sand, and tumbling, is incidental or secondary to its utility of providing a play environment and keeping the sand in one area on the playground. Thus, a sandbox, in its entirety, is not a toy "designed and used principally for amusement" and cannot be classifiable under heading 9503, HTSUS.

Heading 9506, HTSUS, in pertinent part, provides for articles and equipment for outdoor games, not specified elsewhere in the chapter. This describes certain outdoor playground equipment and games. Sandboxes are specifically designed for outdoor playground use and therefore fit within the scope of the heading.

EN 95.06(B), in pertinent part, provides that "[t]his heading covers:

> (B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03)** * * *[.]"
>
> * * * * * * *
>
> (12) Equipment of a kind used in children's playgrounds (e.g., swings, slides, see-saws and giant strides)."

EN 95.06 (B)(12) describes specific examples of equipment of a kind used in children's playgrounds, including swings, slides, and see-saws. This sandbox is made of plastic;

sturdy enough to hold 300 pounds of sand. It is also made to be stored out-of-doors in all kinds of weather. It has rounded corners and surfaces designed for child safety. Sandboxes, and the swings, slides, and see-saws described in EN 95.06 (B)(12), all provide outdoor activity bases on children's playgrounds that are similar in nature. Thus, the sandbox is specifically described under heading 9506, HTSUS, as articles and equipment for outdoor games.

Note 3, Chapter 95, HTSUS, provides that subject to Note 1, Chapter 95, "parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles." General ENs to Chapter 95, HTSUS, provide, in pertinent part, that "[e]ach of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and **provided** they are **not** articles excluded by Note 1 to this Chapter." (Emphasis in the original). Sandbox covers are not excluded by Note 1 to Chapter 95, HTSUS.

The United States Court of Appeals for the Federal Circuit has held that canopies solely dedicated for use with child safety seats, and not designed or sold to be used independently, were properly classified as "parts" of the car safety seats (*Bauerhin Technologies Ltd. Partnership v. United* States, 110 F.3d 774 (Fed. Cir. 1997)). Like the safety seat canopies in *Bauerhin*, the subject sandbox covers are solely dedicated for use with LTC sandboxes, specifically designed to be securely attached to the tops of the sandbox's four poles or to the sides of the box. Similarly, the subject cover is not designed or sold to be used independently.

Thus, the sandbox cover is classifiable under heading 9506, HTSUS, which provides for, in pertinent part, "[a]rticles and equipment for * * * outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[.]" Having established that the subject merchandise satisfies the terms provided in heading 9506, HTSUS, at GRI 1, consideration of any other headings is precluded.

Our determination is supported by New York Ruling (NY) 895598, dated March 28, 1994, where Customs determined that "equipment principally designed for use by children in an outdoor playground activity is classified for tariff purposes in Heading 9506, HTSUS[.]"

Holding:

Based on the foregoing findings, at GRI 1, the subject sandbox cover, model #682570000, is classifiable in subheading 9506.99.60, HTSUS, which provides for "[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: * * * Other: * * * Other[.]"

Effect on Other Rulings:

HQ 961120, dated October 14, 1998, **is revoked.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 966140 BJB
Category: Classification
Tariff No. 9506.99.60

MS. HOPE BAILEY
SCHENKER, INC.
1300 Diamond Springs Road
Virginia Beach, VA 23455

Re: Proposed Revocation of HQ NY I81451; Sandbox cover.

DEAR MS. BAILEY:

This is in reference to New York Ruling Letter (NY) I81451, issued to you on behalf of The Little Tikes Company (LTC), on May 22, 2002, by the Director, Customs National Commodity Specialist Division, New York, New York, concerning the classification of a "sandbox cover," under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY I81451, it was determined that a sandbox cover was classifiable under subheading 6307.90.98, HTSUS (2002), as "[o]ther made up articles, including dress patterns: Other: Other[.]"

We have reviewed the ruling in NY I81451, and have determined the classification to be incorrect. This ruling revokes NY I81451 and sets forth the correct classification.

Facts:

The merchandise was identified as a cover of man-made textile panels sewn together, and designed, for a sandbox (sandbox cover), measuring approximately 50-inches by 50-inches square. The edges of the cover are hemmed with an elastic fabric sewn into each corner and textile straps attached to one side of the cover to secure it to the sandbox.

Issue:

Whether the sandbox cover is classifiable under heading 6307, HTSUS, as "[o]ther made up articles[;]" 9503, HTSUS, as "[o]ther toys; * * *; parts and accessories thereof[;]" heading 9506, HTSUS, as "outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[;]" or elsewhere in the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under General Rule of Interpretation (GRI) 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS (2003) provisions under consideration are as follows:

6307	Other made up articles, including dress patterns:
6307.90	Other:
6307.90.98	Other
*	* * * * * * *
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90	Other
*	* * * * * * *
9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not spe-

cified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:

Other:

9506.99		Other:
9506.99.60		Other

* * * * * * *

An article is to be classified according to its condition as imported. *See XTC Products, Inc. v. United States*, 771 F. Supp. 401, 405 (1991). *See also United States v. Citroen*, 223 U.S. 407 (1911). In its condition, as imported, the subject good is a sandbox cover made of nylon or polyester fabric.

At GRI 1, heading 6307, HTSUS, provides for "[o]ther made up articles, including dress patterns[.]" However, Note 1(t) to Section XI, (which covers heading 6307, HTSUS), provides that the section does not cover: "[a]rticles of chapter 95 (for example, toys, games, sports requisites and nets)[.]" Therefore, if the sandbox cover is a good classifiable under heading 9503, or 9506, HTSUS, it cannot be classifiable under Chapter 63, HTSUS.

Heading 9503, HTSUS, provides for, in pertinent part, "[o]ther toys * * *; parts and accessories thereof[,]" and heading 9506, HTSUS, provides for, in pertinent part, "[a]rticles and equipment for * * * other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[.]"

Since articles and equipment for outdoor playground games provide some amusement, the issue is whether or not the sandbox provides the "amusement" and "play" of an "other toy" described in heading 9503, HTSUS. The determination of whether a sandbox for which the subject cover is designed is classifiable as an "other toy" or as an "outdoor game," is not *prima facie* clear.

With regard to heading 9503, HTSUS, the term "toy" is not specifically defined in the tariff, or the ENs. The ENs to Chapter 95, HTSUS, provide that: "this chapter covers toys of all kinds whether designed for the amusement of children or adults."

It is Customs position that a toy is essentially a plaything, something that is intended and designed for the amusement of children or adults, and which by its very nature and character is reasonably fitted for no other purpose. Customs views the "amusement" requirement as indicating that toys should be designed and used principally for amusement and that they not serve a **utilitarian purpose.** *See* Additional U.S. Rule of Interpretation 1(a), HTSUS. Further, Customs defines "principal use" as that use which exceeds each other single use of the article.

A sandbox is designed to hold sand in a prescribed area and provide a play environment for children's playground games. A sandbox itself does not provide the manipulative play value or frivolous amusement characteristic of toy playthings. In this case, children play with the sand in the sandbox, they do not play with the sandbox. Any amusement derived from playing in the sandbox, *e.g.*, from its shape, digging in the sand, and tumbling, is incidental or secondary to its utility of providing a play environment and keeping the sand in one area on the playground. Thus, a sandbox is not a toy "designed and used principally for amusement," and cannot be classifiable under heading 9503, HTSUS.

Heading 9506, HTSUS, in pertinent part, provides for articles and equipment for outdoor games, not specified elsewhere in the chapter. This describes certain outdoor playground equipment and games. Sandboxes are specifically designed for outdoor playground use and therefore fit within the scope of the heading.

EN 95.06(B), in pertinent part, provides that "[t]his heading covers:

> (B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03)** * * *[.]"
>
> * * * * * * *
>
> (12) Equipment of a kind used in children's playgrounds (e.g., swings, slides, see-saws and giant strides)."

EN 95.06 (B)(12) describes specific examples of equipment of a kind used in children's playgrounds, including swings, slides, and see-saws. Much of the literature available about LTC sandboxes on the internet provides that they are sturdy and geared for playground use. LTC sandbox, model #4850, for example (not subject of this ruling), is covered by a smaller 40-inch by 42-inch cover but sturdy enough to hold 300 pounds of sand, and to be stored out-of-doors in all kinds of weather. Generally, LTC sandboxes have rounded corners and surfaces designed for child safety. Sandboxes, and the swings, slides, and see-saws described in EN 95.06 (B)(12), all provide outdoor activity bases on children's

playgrounds that are similar in nature. Thus, sandboxes are specifically described under heading 9506, HTSUS, as articles and equipment for outdoor games.

Note 3, Chapter 95, HTSUS, provides that subject to Note 1, Chapter 95, "parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles." General ENs to Chapter 95, HTSUS, provide, in pertinent part, that "[e]ach of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and **provided** they are **not** articles excluded by Note 1 to this Chapter." (Emphasis in the original). Sandbox covers are not excluded by Note 1 to Chapter 95, HTSUS.

The United States Court of Appeals for the Federal Circuit has held that canopies solely dedicated for use with child safety seats, and not designed or sold to be used independently, were properly classified as "parts" of the car safety seats (*Bauerhin Technologies Ltd. Partnership v. United States*, 110 F.3d 774 (Fed. Cir. 1997)). Like the safety seat canopies in *Bauerhin*, the subject sandbox cover is solely dedicated for use with an LTC sandbox, specifically designed to be fitted to the corners of the base, and attached to at least one side, of the box. Similarly, the subject cover is not designed or sold to be used independently.

Thus, this sandbox cover is classifiable under heading 9506, HTSUS, which provides for, in pertinent part, "[a]rticles and equipment for * * * outdoor games, not specified or included elsewhere in this chapter; * * *; parts and accessories thereof[.]" Having established that the subject merchandise satisfies the terms provided in heading 9506, HTSUS, at GRI 1, consideration of any other headings is precluded and we conclude that NY I81451 was in error.

Our determination is supported by New York Ruling (NY) 895598, dated March 28, 1994, where Customs determined that "equipment principally designed for use by children in an outdoor playground activity is classified for tariff purposes in Heading 9506, HTSUS[.]"

Holding:

Based on the foregoing findings, at GRI 1, the subject sandbox cover, is classifiable in subheading 9506.99.60, HTSUS, which provides for "[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other[.]"

Effect on Other Rulings:

NY I81451, dated May 22, 2002, **is revoked.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ALKALINE BATTERIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of ruling letters and revocation of treatment relating to tariff classification of alkaline batteries.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter and modifying a ruling letter pertaining to the tariff classification of alkaline batteries under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the CUSTOMS BULLETIN on December 4, 2002. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 31, 2003.

FOR FURTHER INFORMATION CONTACT: David Salkeld, General Classification Branch, (202) 572–8781.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the CUSTOMS BULLETIN on December 4, 2002, proposing to revoke NY D83627, dated November 12, 1998, and proposing to modify NY I84002, dated July 24, 2002, which involved the classification of alkaline batteries. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY I84002 and is revoking NY D83627 and any other ruling not specifically identified in order to reflect the proper classification of the alkaline batteries pursuant to the analysis set forth in HQ 966022 and 966038. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 966022 and 966038 are "Attachments A and B" respectively.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 10, 2003.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 10, 2003.

CLA–2 RR:CR:GC 966022 DSS
Category: Classification
Tariff No. 8506.10.00

MR. FRANKLYN T. YEPEZ
TRANS-BORDER CUSTOMS SERVICES, INC.
JFK INTERNATIONAL AIRPORT
Cargo Building #80, Rm. 228
Jamaica, NY 11430

Re: Revocation of NY D83627; alkaline batteries from Belgium.

DEAR MR. YEPEZ:

This letter is pursuant to Customs reconsideration of New York ruling (NY) D83627, dated November 12, 1998, which was issued to you on behalf of your client, Innopex Limited, by the Director, National Commodity Specialist Division with respect to the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of alkaline batteries. After review of NY D83627, Customs has determined that the classification of alkaline batteries under subheading 8506.80.00, HTSUS, was incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modification) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), a notice was published on December 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 49, proposing to revoke NY D83627. No comments were received in response to this notice.

Facts:

In NY D83627, Customs described the merchandise as AA alkaline batteries. In NY D83627, Customs classified the subject alkaline batteries under subheading, 8506.80.00, HTSUS, which provides for "Primary cells and primary batteries; * * * Other primary cells and primary batteries."

Issue:

What is the proper tariff classification for alkaline batteries?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Other Customs rulings have classified alkaline batteries under subheading 8506.10.00, HTSUS. *See* NY G82460, dated October 20, 2000, and NY I85737, dated September 6, 2002.

Thus, the HTSUS provisions under consideration are as follows:

8506	Primary cells and primary batteries; parts thereof:
8506.10.00	Manganese dioxide
* * * * * * *	
8506.80.00	Other primary cells and primary batteries

Goods of heading 8506 generate electrical energy by means of chemical reactions. Primary cells of heading 8506 consist of a container holding an alkaline or non-alkaline electrolyte in which two electrodes, an anode and a cathode, are immersed. Each electrode is

provided with a terminal or other arrangement for connection to an external circuit. Primary cells may be used individually or they may be grouped together in batteries, either in series, or in parallel or a combination of both. The principal characteristic of goods of heading 8506 is that they cannot be readily or efficiently recharged. Heading 8506 provides for a class of goods *eo nominee,* by name. *See HQ 954373*, dated September 14, 1993. Therefore, alkaline batteries are classified under heading 8506, HTSUS.

The EN for subheadings 8506.10, 8506.30 and 8506.40, (p. 1631), provides, in pertinent part, "* * * Classification in these subheadings is determined by the composition of the cathode (depolarizing electrode) * * *." Alkaline batteries generally contain cathodes composed of manganese dioxide. *Van Nostrand's Scientific Encyclopedia* (5th Ed. 1976) provides in pertinent part:

> *Alkaline Primary Cells.* The electrochemical system of alkaline cells is comprised of a zinc anode of large surface area, a manganese dioxide cathode of high density, and a potassium-hydroxide electrolyte * * * Two principal features [of an alkaline battery] are a manganese dioxide cathode of high density in conjunction with a steel can which serves as a cathode current collector and a zinc anode of extra high surface area in contact with the electrolyte.

Therefore, because the cathode for alkaline batteries is made from manganese dioxide, the instant alkaline batteries are specifically provided for under subheading 8506.10.00, HTSUS.

Holding:

In accordance with the above discussion, the correct classification for alkaline batteries is subheading 8506.10.00, HTSUS, which provides for "Primary cells and primary batteries; * * * Manganese dioxide."

Effect on Other Rulings:

NY D83627 is REVOKED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 10, 2003.

CLA–2 RR:CR:GC 966038 DSS
Category: Classification
Tariff No. 8506.10.00

MS. JENNY DAVENPORT
WAL-MART STORES, INC.
702 Southwest 8th Street
Bentonville, AR 72716

Re: Modification of NY I84002; alkaline batteries.

DEAR MS. DAVENPORT:

This letter is pursuant to Customs reconsideration of New York ruling (NY) I84002, dated July 24, 2002, which was issued to you by the Director, National Commodity Specialist Division with respect to the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of several articles, including alkaline batteries. After review of NY I84002, Customs has determined that the classification of alkaline batteries under subheading 8506.80.00, HTSUS, was incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modification) of the North American Free Trade Agreement Im-

plementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), a notice was published on December 4, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 49, proposing to modify NY I84002. No comments were received in response to this notice.

Facts:

In NY I84002, Customs described several articles, including two AA-alkaline batteries. In NY I84002, Customs classified the subject alkaline batteries under subheading, 8506.80.00, HTSUS, which provides for "Primary cells and primary batteries; * * * Other primary cells and primary batteries."

Issue:

What is the proper tariff classification for alkaline batteries?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Other Customs rulings have classified alkaline batteries under subheading 8506.10.00, HTSUS. *See* NY G82460, dated October 20, 2000, and NY I85737, dated September 6, 2002.

Thus, the HTSUS provisions under consideration are as follows:

8506	Primary cells and primary batteries; parts thereof:
8506.10.00	Manganese dioxide
* * * * * * *	
8506.80.00	Other primary cells and primary batteries

Goods of heading 8506 generate electrical energy by means of chemical reactions. Primary cells of heading 8506 consist of a container holding an alkaline or non-alkaline electrolyte in which two electrodes, an anode and a cathode, are immersed. Each electrode is provided with a terminal or other arrangement for connection to an external circuit. Primary cells may be used individually or they may be grouped together in batteries, either in series, or in parallel or a combination of both. The principal characteristic of goods of heading 8506 is that they cannot be readily or efficiently recharged. Heading 8506 provides for a class of goods *eo nominee*, by name. *See HQ 954373*, dated September 14, 1993. Therefore, alkaline batteries are classified under heading 8506, HTSUS.

The EN for subheadings 8506.10, 8506.30 and 8506.40, (p. 1631), provides, in pertinent part "* * * Classification in these subheadings is determined by the composition of the cathode (depolarizing electrode) * * *." Alkaline batteries generally contain cathodes composed of manganese dioxide. *Van Nostrand's Scientific Encyclopedia* (5th Ed. 1976) provides in pertinent part:

> *Alkaline Primary Cells.* The electrochemical system of alkaline cells is comprised of a zinc anode of large surface area, a manganese dioxide cathode of high density, and a potassium-hydroxide electrolyte * * * Two principal features [of an alkaline battery] are a manganese dioxide cathode of high density in conjunction with a steel can which serves as a cathode current collector and a zinc anode of extra high surface area in contact with the electrolyte.

Therefore, because the cathode for alkaline batteries is made from manganese dioxide, the instant alkaline batteries are specifically provided for under subheading 8506.10.00, HTSUS.

Holding:

In accordance with the above discussion, the correct classification for alkaline batteries is subheading 8506.10.00, HTSUS, which provides for "Primary cells and primary batteries; * * * Manganese dioxide."

Effect on Other Rulings:

NY I84002 is MODIFIED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

JOHN G. BLACK,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

[PUBLIC VERSION]

(Slip Op. 02–148)

AUSIMONT SPA AND AUSIMONT USA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND E.I. DUPONT DE NEMOURS, DEFENDANT-INTERVENOR

Court No. 98–10–03063

[Plaintiffs' motion for further remand of results of redetermination to the Department of Commerce denied; remand results sustained.]

(Decided December 17, 2002)

MRC Inc. (John Hoellen), Washington, D.C., for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau),* for defendant.

Wilmer Cutler & Pickering (Ronald I. Meltzer, John D. Greenwald, Francesca E. Bignami, and *Christopher J. Kent),* Washington, D.C., for defendant-intervenor.

OPINION

MUSGRAVE, *Judge:* This opinion examines Commerce's remand results following *Ausimont SpA v. United States,* Slip Op. 01–92 (2001).[1] The issue is whether certain home market sales of wet reactor bead were made in the "ordinary course of trade," defined by statute to mean "the conditions and practices which, for a reasonable period of time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."[2] 19 U.S.C. § 1677(15). Since there were no other home market sales of wet reactor bead that could serve as a basis for comparison, and due to inconsistency in comparing the contested sales with granular PTFE resin sales, Commerce was ordered to reconsider, without limita-

[1] Familiarity with the prior opinion including abbreviations therein is presumed.

[2] *See* Pub. L. 103–465 § 222(h), 108 Stat. 4809 (substituting "subject merchandise" for "merchandise which is the subject of this investigation"). *See also* H.R. Rep. No. 826(I) at 65 (1994), *reprinted in 1995 U.S.C.C.A.N.* 3773 ("What formerly was referred to as 'class or kind' of merchandise subject to investigation or covered by an order is now referred to simply as the 'subject merchandise.'").

tion: (1) the contested sales *qua* wet reactor bead, not as a model of granular PTFE resin; (2) relative volume and frequency, and aggregate comparisons of quantity, price, and profit, or such other methodology as Commerce might determine was more appropriate; (3) the market for wet reactor bead in Italy; and (4) the differences between the terms and conditions of wet reactor bead sales and granular PTFE resin sales in Italy based on the verified documentation.

The *Remand Results* state that: (a) wet reactor bead and granular PTFE resin are within the "same class or kind" of merchandise and therefore are comparable product types for purposes of an ordinary course of trade determination; (b) a model-specific comparison of wet reactor bead sales to the sales of other PTFE resin models is reasonable, and re-examination of volume, frequency, quantity, profit, price, and market demand, does not indicate that the wet reactor bead sales are outside the ordinary course of trade; (c) the record does not support the conclusion that the contested sales were not made in normal commercial quantities; (d) the terms and conditions of sales for wet reactor bead are not unusual. Specifically, Commerce determined as follows.

Total quantity. Commerce divided all PTFE sales under review into five intervals: (1) below 10,000 kilograms; (2) 10,000 to 19,999 kilograms; (3) 20,000 to 29,999 kilograms; (4) 30,000 to 39,999 kilograms; and (5) 40,000 and higher kilograms. These categories amounted to 72.55 percent, 7.84 percent, 5.88 percent, 1.96 percent, and 11.76 percent, respectively, of total PTFE sales included in the analysis. The total volume of the contested sales was greater than [ ] percent of granular PTFE resin sales, *i.e.* about [ ] percent of the remaining individual granular PTFE models were sold in higher quantities. Commerce therefore found the contested sales volume to be significant in comparison with individual PTFE resin product sales volumes. *Remand Results* at 5–6.

Average quantity. Commerce found that average quantity of PTFE resin product sales varies from model to model, irrespective of sales frequency. *Id.* at 6. Average quantity ranged from [ ] kilograms for product code 380879 to [ ] kilograms for product code 380127 for the same number of transactions. The average volume for the contested sales was [ ] kilograms, higher than the average volume of any other PTFE resin product, which Commerce determined was not "significantly" higher than the average volume of product code 380127, the transactions in which ranged from [ ] percent to [ ] percent of the volume of the contested sales. Commerce reasoned that the "large differences in the average volume among the individual models of PTFE resin supports the fact that the average volume of wet reactor bead, while higher than the average volumes of sales of PTFE resin models, is consistent with the pattern of variations in the average volume among the different models." *Id.*

Frequency. The range of frequencies for each product varied from [ ] to [ ] transactions. Commerce found "no correlation between the number of transactions and the quantity sold" since wet reactor bead "is sold

at least as frequently as [ ] percent of the individual models sold during the POR[.]" Commerce therefore found the frequency of wet reactor bead sales to be not unique or unusual compared to the frequency of several other PTFE resin models sales. *Id.* at 6–7.

Profit. The profit rates for PTFE resin products ranged from [ ] percent to [ ] percent, including five PTFE resin models that exceeded the [ ] percent profit rate for wet reactor bead sales. The profit margin for product code 380294 differed from that for the contested sales by less than one percent. Seven other PTFE products had profits ranging from [ ] to [ ] percent. Commerce therefore concluded that the profit rate for wet reactor bead was not unusual when compared to the profit rates for these PTFE models. *Id.*

Price. Commerce compared the weighted-average price of wet reactor bead sales to those of the individual models PTFE resin models and found that "the price ratios of wet reactor bead to PTFE resin are between [ ] and [ ] percent of approximately [ ] percent of the total PTFE resin models sold during the POR." *Id.* at 7–8. In particular, Commerce noted that the average price of PTFE resin product code 380127 is just below the average price for wet reactor bead. Thus, the agency found that "the average price for wet reactor bead approximates the average price for several other PTFE resin models[.]" *Id.* at 8.

Usual commercial quantities. Commerce rejected Ausimont's "usual commercial quantities" claim, *see* 19 U.S.C. § 1677b(a)(1)(B)(i), because it determined that the total and the average quantities of wet reactor bead sales were within the normal range of the total and average quantities and average price for sales of product code 380127. *Id.*

Number of customers. [ ] percent of the individual PTFE resin models were sold to one customer only. Commerce therefore found the fact that the contested sales had been sold to a single customer not unusual. *Id.*

Market. On whether there is a "market" for wet reactor bead, Commerce stated that its prior statement in the circumvention proceeding that there was "virtually no market" for wet reactor bead is "meaningless" since that factor was determined in conjunction with other ordinary course of trade factors but it acknowledged that the *Final Results* "should have focused primarily on the facts presented in the review at issue[,] not historical information from prior review periods, in which ordinary course of trade regarding wet reactor bead sales in the home market was not an issue[.]"[3] Commerce then went on to conclude that "independent of prior determinations * * * the evidence before it sufficiently merits the finding of a market." *Id.* at 9. Specifically, it relied on the fact that the frequency of the contested sales to a single customer was equal to or greater than [ ] percent of other PTFE resin models.

[3] In response to the Court's request to clarify its statement from the prior anti-circumvention proceeding that there was "virtually no market" for wet reactor bead, Commerce responds that it would be inappropriate to compare Commerce's determination in the anti-circumvention proceeding with its finding in the instant matter because the anti-circumvention proceeding "was not intended to examine the issue of whether certain sales are outside the ordinary course of trade, but rather discuss particular scope issues." *Remand Results* at 9. Commerce explained that its comment was intended in reference to the U.S. market, not the foreign market, and that referencing prior segments of the proceeding was merely intended to dispute Ausimont's contention that the contested sales were outside the ordinary course of trade because there were no reported sales of such products in the immediately preceding review. *Id.*

Terms of Sale. Commerce found that the terms of sale for wet reactor bead were not unusual because, although Ausimont claimed they were negotiated separately between Ausimont and the single purchaser, this was not brought to Commerce's attention during verification and there is no record evidence showing that such negotiations were peculiar to wet reactor bead. *Id.* at 12, referencing R.Doc 576 (Ausimont's December 19, 1997 response) at A–12 ("[t]here are no published price lists in Italy"), A–6 (prices for PTFE resin "are negotiated on a case-by-case basis with individual customers"). Ausimont also argued that because wet reactor bead was purchased on a "pending order" basis (meaning that Ausimont could cancel the order if it could not fill it by the target date), this distinguished it from granular PTFE resin sales, however Commerce determined that "open order" sales of granular PTFE resin, whereby the customer would periodically inform of the amount desired and Ausimont would ship product at the then-prevailing price, meant that such sales were similar to the term for wet reactor bead: both instances were not a commitment to purchase a particular quantity at a set price. *Id.*

Considering these factors individually and under a "totality of the circumstances" as a whole, Commerce determined that foregoing factors supported finding that the contested sales were not made outside the ordinary course of trade. *Id.* at 8.

DISCUSSION

The standard of review on remand results remains whether the agency's determination is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).[4]

A.

The *Remand Results* conclude that the two product types are comparable (1) because the circumvention proceeding determined that wet reactor bead is subject to the antidumping duty order and in accordance with the circumvention proceeding is differentiated from granular PTFE resin only by a small difference in value and a relatively uncomplicated process of further manufacture and (2) because declining to

[4] "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Corp. v. NLRB*, 305 U.S. 197, 229 (1938) (citation omitted). The Supreme Court has further stated that under the substantial evidence standard "[a] court reviewing an *agency's* adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole. * * * The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (emphasis in original; citation omitted). *See also Consolo v. Federal Maritime Commission*, 373 U.S. 607, 620 (1966) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence."); *Inland Steel Industries, Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999) (reviewing courts do not weigh the evidence to determine whether a different conclusion is possible); *Matsushita Elec. Industries Co. v. United States*, 730 F.2d 927 (Fed. Cir. 1984) ("It is not the court's function to decide that it would have made another decision on the basis of the evidence."); *FAG Kugelfischer v. United States*, 932 F. Supp. 315, 317 (CIT 1996), *quoting Timken Co. v. United States*, 699 F. Supp. 300, 306 (CIT 1988), aff'd 894 F.2d 385 (Fed. Cir. 1990) ("It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record."). But, substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

compare wet reactor bead and granular PTFE resin "would exaggerate the small difference in value and the complexity of processing between wet reactor bead and PTFE resin[.]" Therefore, Commerce reiterated that wet reactor bead is a model "of the same class or kind" of merchandise for purposes of ordinary course of trade analysis and concluded that "wet reactor bead is one of the numerous unique products, within a class of PTFE products, that reflects unique characteristics and intended applications, as is the case with the other PTFE resin models." *Remand Results* at 4. *See* 19 U.S.C. § 1677(15). *See also Granular Polytetrafluoroethylene Resin From Italy; Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 Fed. Reg. 26100, 21002 (Apr. 30, 1993).

In general, Ausimont argues that the differences between wet reactor bead and granular PTFE resin outweigh their similarities but that Commerce has ignored the order to regard wet reactor bead for its own sake, *qua* wet reactor bead, and not as a model of granular PTFE resin. It contends that the circumvention proceeding did not specifically determine that wet reactor bead is of the same "class or kind" of merchandise as granular PTFE resin but determined only that the value added from processing wet reactor bead into granular PTFE is small relative to the cost of manufacturing wet reactor bead in Italy, and also that the United States further-manufacturing process was not complex relative to the process required to produce wet reactor bead. Ausimont further argues that Commerce departed from its "routine" practice of considering the differences in the intended uses of the products, the ultimate expectations of the purchasers, the physical characteristics of the products under comparison, and the manner in which the products are advertised, in reaching the remand results at issue. Pl.s' Br. at 10–13 referencing *Laclede Steel Co. v. United States*, 19 CIT 1076 (1995).

The government and DuPont contend that "class or kind" distinctions are not required, that Commerce has complied with the Court's order, and/or that Ausimont is attempting to re-litigate the circumvention determination. They argue that consideration on remand of the factors Ausimont advocates was unnecessary because 19 U.S.C. § 1677(15) only requires consideration of the "conditions and practices" of the "same class or kind" of merchandise, and the *Remand Results* state that granular PTFE products vary widely by composition and intended application and are generally not interchangeable yet Ausimont did not argue that such products are not comparable. *Remand Results* at 3–4

The circumvention proceeding under 19 U.S.C. § 1677j settled the issue of whether wet reactor bead is of the same "class or kind" of merchandise subject to the outstanding antidumping order on granular PTFE resin. In general, a question on the "class or kind" of merchandise subject to an outstanding order is an issue of fact for resolution by Commerce, in consultation as necessary with the U.S. International Trade Commission. *See* 19 C.F.R. § 351.225. In a typical "other" scope proceeding, when the question cannot be resolved based on the four corners of

the petition, Commerce will consider the physical characteristics of the product, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product is advertised or displayed. 19 C.F.R. § 351.225(k). Consideration of these criteria were approved in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). By contrast, a section 1677j circumvention proceeding is a "clarification or interpretation" of an outstanding order to include products that may not fall within the order's literal scope. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). *See Granular Polytetrafluoroethylene Resin From Italy: Final Affirmative Determination of Circumvention of Antidumping Duty Order,* 58 Fed. Reg. 26100, 26102 (Apr. 30, 1993). Inclusion of wet reactor bead within the ambit of the antidumping order resulted from the agency's determination that merchandise sold in the United States (granular PTFE resin) that had been "completed" from imported "parts or components" (wet reactor bead) is of the "same class or kind" of merchandise that is the subject of an antidumping or counterveiling duty order or finding (granular PTFE resin). *See* 19 U.S.C. § 1677j; 19 C.F.R. § 351.225(g). Each antidumping duty order is intended to cover a single "class or kind" of "subject merchandise."[5] *See* 19 U.S.C. § 1677(25). Commerce thus interprets the effect of an affirmative circumvention determination as rendering "parts or components" *ipsi dixit* the same "class or kind" of merchandise as the completed merchandise. *See, e.g., Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta From Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 63 Fed. Reg. 54672, 54673 (Oct. 13, 1998) ("the statute regards the components subject to the finding of circumvention as, in effect, imports of the subject merchandise, rather than components, *per se.*"); *Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom and Germany,* 62 Fed. Reg. 34213, 34215 (Jun. 25, 1997) ("an affirmative finding of circumvention treats the parts and components as constructively assembled into subject merchandise at the time of import"). Thus, to interpret wet reactor bead as being part of the same "class or kind" of merchandise as granular TPFE resin as a result of the circumvention proceeding is a logical construction of the statutory scheme.

However, the Court disagrees that Ausimont's argument is attempting to re-litigate that proceeding, and it further disagrees that categories of the "class or kind" may not be legally required. The statutory definition of "foreign like product" is predicated on categories of increasingly dissimilar product attributes, *see* 19 U.S.C. § 1677(16),[6] and a

[5] For example, the *Antifriction Bearings* cases involve separate investigation numbers and antidumping duty orders on each "class or kind" of antifriction bearing (*e.g.*, CRBs, SPBs, *et cetera*).

[6] "Foreign like product" means, in descending order of preference, (1) "identical" merchandise, (2) "like" merchandise that is of approximately equal commercial value, component material, and use, and is produced by the same person and in the same country, or (3) "like" merchandise that is of the "same general class or kind" and use, and is produced by the same person and in the same country. 19 U.S.C. § 1677(16).

product's use and physical characteristics are mandatory considerations that permeate the statutory scheme.[7] The fact the products are of the "same class or kind" does not mean, *ergo*, that the products are comparable for purposes of the ordinary course of trade analysis. That fact alone is irrelevant, because the ordinary course of trade analysis always concerns sales of the same class or kind of merchandise, *see* 19 U.S.C. § 1677(15), which, Commerce acknowledges, can encompass dissimilar products types. The remand order did not compel the creation of distinct categories but left it to the parties to attempt to resolve the proper treatment of the issue, but the Court's opinion did acknowledge the obvious fact that the attributes of wet reactor bead and granular PTFE resin make them distinct products. Cement and clinker have been determined to constitute the same "class or kind" but different "such or similar" categories because of different product uses, *see Calcium Aluminate Cement, Cement Clinker and Flux From France*, 59 Fed. Reg. 14136, 14141 (Mar. 25, 1994), and wet reactor bead is to granular PTFE resin as clinker is to cement. *See* Slip Op. 01–92 at 16, 38. In any case, it is the underlying data that legally control the propriety of a chosen methodology, not the other way around. *See* Slip Op 01–92 at 39 ("sales must be examined for what they are, whether or not there is formal division into * * * product categories"). The government and DuPont resist the idea that so-called *Diversified Products* criteria are applicable to "class or kind" categories or ordinary course of trade analyses, but the "totality of the circumstances" standard controls the latter, and the circumstances of a given case may *require* consideration of such criteria. *Cf. Laclede Steel Co., supra*, 19 CIT at 1080 (considering *inter alia* that overrun and commercial pipe differ in terms of end use and lack of assurance to customers that overrun pipe meets industry specifications);[8] *Mantex, Inc. v. United States*, 17 CIT 1385, 1405, 841 F. Supp. 1290, 1307 (1993) (approving analysis of differences in uses of ASTM pipe and Indian Standard pipe as one of the key factors for finding ASTM pipe sales in the home market to have been made outside the ordinary course of trade); *Lightweight Polyester Filament Fabric From Japan*, 49 Fed. Reg. 472, 476 (Jan. 4, 1984) (Final LTFV Determ.) (Comment 3) (suitability of certain semi-finished over finished fabrics for use in garments). *Cf. also In the Matter of Live Swine From Canada*, Secretariat File No. USA–94–1904–01 (U.S.-Canada Binational Panel Decision) (May 30,

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[7] *Compare* 19 U.S.C. § 1677(10) (the "domestic like product" that is harmed by dumping is predicated on determining which product(s) are "like" or "most similar" to the "article subject to an investigation" based on physical characteristics and "uses") *with* 19 U.S.C. § 1677(16)(B) & (C) (administering authority is required to consider "the purposes for which used" with respect to non-identical "foreign like product" determinations). *See also Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 9 CIT 520, 622 F. Supp. 1071 (1985) ("purposes for which used" required comparison of tubes for passenger cars with tubes for other passenger cars and not with tubes for trucks or farm vehicles). *See also, e.g., Malleable Cast Iron Pipe Fittings, Other than Grooved, from Brazil*, 51 Fed. Reg. 10897 (March 31, 1986) (Comment 1) (interchangeability of pipe). *Cf. Certain Forged Steel Crankshafts From the United Kingdom*, 52 Fed. Reg. 32951, (Sep. 1, 1987) (Final LTFV Determ.) (Comment 1) (no well-established designations for types of merchandise in the crankshaft industry distinguishes product "use"). To the extent that "other" scope determinations "will consider" differences/similarities in physical product characteristics and uses, among other factors, 19 C.F.R. § 351.225(k) is a mere restatement of the obvious.

[8] DuPont characterizes *Laclede* as concerned only with end use. It is apparent, however, that Commerce touched upon other *Diversified Products* criteria, directly or indirectly, among other factors also considered. *See* 19 CIT at 1080.

1995) ("Commerce does not point to anything to support [its] * * * reading of the congressional intent, *i.e.*, that subclasses are permitted but that the Diversified Products test is not an appropriate methodology for their creation.").

Commerce has discretion over the method of analyzing ordinary course of trade claims, but the exercise of that discretion must abide by well-established principles of administrative law. Commerce must be consistent in its analyses and it must not ignore relevant data. *E.g.*, *RHP Bearings, Ltd. v. United States*, 288 F.3d 1334 (Fed. Cir. 2002); *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997); *D&L Supply Co. v. United States*, 113 F.3d 1220 (Fed. Cir. 1997). *Cf. Laclede, supra.* It is fundamental that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manuf. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). *See also Manifattura Emeppi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992) (selection of "best information otherwise available is subject to a rational relationship between data chosen and the matter to which they are to apply"). On review thereof, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1975).

Nonetheless, a determination of "less than ideal clarity" may be upheld "if the agency's path may be reasonably discerned." *Id.* at 286. Here, Commerce determined that inferences are possible from comparisons of wet reactor bead and granular PTFE resin sales because the circumvention proceeding determined that the products are of comparable value and of relative manufacturing complexity. At the same time, Commerce acknowledged that the products are different, since it granted a difference in merchandise adjustment, implying that wet reactor bead is "similar" to granular PTFE resin but has "commercially significant" differences. *See Pasquera Mares Austreles Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001). Commerce's reliance on the significance of the variation among granular PTFE resin products in composition and uses and in the fact that they are generally not interchangeable[9] to support its argument that wet reactor bead and granular PTFE resin are comparable does not address the degrees of association between the attributes of the *semi-f*inished product versus the *further-f*inished products, and Commerce does not otherwise comment

[9] Commerce observed that granular PTFE resin is used to produce "marketable shapes and forms" that "vary significantly" depending upon the production process. *See Remand Results* at 3 (citations omitted). Granular PTFE resin can be unfilled (virgin) or filled with glass, carbon, graphite, non-oxidized bronze, ceramics, super-conductive carbon, alumina, calcium fluoride, stainless steel, nickel, pigments, and polymer. Within each product category of virgin and filled PTFE resins there is a "wide range" of different types and grades with mechanical, chemical, and electrical characteristics and applications. The uses of granular PTFE resin thus extend across automotive, aerospace, electronics, chemical production, food, refrigeration, and construction industries, and include hook-up wires, coaxial cables, interconnecting wiring, aerospace and automotive connectors, seals, piston rings, bushing, slide bearings, and tapes. *Id.*

on wet reactor bead use[10] except to note "the wide range of models and intended applications with the PTFE class of products" *as a whole*. *Remand Results* at 3. It is therefore arguable that the written results of remand are deficient in this respect. But, in the final analysis, it is apparent that Commerce was aware of Ausimont's points and considered them. *See, e.g., id.* 3 ("[n]otwithstanding Ausimont's contention that because wet reactor bead varies so significantly in physical characteristics and application from PTFE resin that it should be considered a distinct product, * * *."). Commerce essentially concluded that the qualitative differences between the two types of products did not outweigh their commonalities ("wet reactor bead is one of the numerous unique products, within a class of PTFE products, that reflects unique characteristics and intended applications, as is the case with the other PTFE resin models") and that therefore wet reactor bead and granular PTFE resin are comparable products for purposes of an ordinary course of trade analysis. Taken as a whole, the Court is unable to conclude that the *Remand Results* do not reflect a "rational connection between the facts found and the choice made." Ausimont's arguments with respect to product use, purchaser expectation, differing physical characteristics, manner in which advertised, *et cetera*, do not demonstrate, as a matter of fact, that wet reactor bead and granular PTFE resin are *not* comparable products for purposes of an ordinary course of trade analysis or that Commerce's conclusion was unreasonable or unsupported by substantial evidence on the record.[11] The Court is not free to substitute judgment on the issue. *See supra*, note 4.

B.

Because of the "wide" variations in characteristics and applications, Commerce states that it had to undertake a "model specific" analysis of the contested sales. In general, Ausimont criticizes Commerce for analyzing each of the quantitative factors by comparing the wet reactor bead sales to data points picked from the entire range of granular PTFE resin sales instead of what is typical or normal within that range of data. Ausimont argues that Commerce's "established" ordinary-course-of-trade practice is to compare contested sales to the remaining sales in the aggregate and that Commerce has provided no explanation for why departing from this practice "would exaggerate the small difference in value and the complexity of processing between wet reactor bead and PTFE resin." If wet reactor bead sales had been analyzed in the context of granular PTFE resin sales as a whole, Ausimont contends, the issue of whether or not they are a "model" of granular PTFE resin is rendered irrelevant. Ausimont further argues that if Commerce's logic was valid, it would follow this professed "model-specific" approach in every ordi-

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[10] Ausimont states that wet reactor bead is used to produce not only granular PTFE resin but also lubricant powders not within the current scope of the antidumping order. Pl.s' Br. at 11.

[11] Ausimont did not provide Commerce with statistical or other proofs that might have supported its position. A chi-squared distribution, for example, might have been an appropriate test of the null hypothesis given the circumstances at issue.

nary course of trade situation, whereas, according to Ausimont, Commerce's policy is exactly the opposite.[12]

However, the order of remand did not prohibit the use of an "individual model" methodology, and Commerce explained that the variation in kinds and number of products constituting the "class or kind" justified the approach taken. The Court cannot conclude that this was unreasonable or that it was in error for Commerce to have utilized an individual model approach, even assuming arguendo the existence of administrative practice in this area. *See American Silicon Technologies v. United States,* 19 CIT 776, 777, 19 F. Supp. 2d 1121, 1123 (1998) ("[i]t is a general rule that an agency must either conform itself to its prior decisions or explain the reason for its departure.").

Turning to the specific factors considered, Ausimont argues that Commerce's use of "total quantity"[13] is also contrary to agency practice, which is to examine relative sales volume and frequency. *See Gray Portland Cement and Clinker From Mexico*, 65 Fed. Reg. 13943 (Mar. 15, 2000) (Final Rev. Results).[14] Under the new concept, all but one of the models relied on by Commerce to support its decision would have the lowest or near the lowest total quantities of all models under review. If "total quantity" is a valid analytical tool, Ausimont argues, then to be consistent Commerce should have excluded those models too, but the reason Commerce did not do so is because it is required to examine the totality of the circumstances, not just a few factors in isolation, and the proper context of that consideration is that sales of granular PTFE resin are regularly made in the Italian market but sales of wet reactor bead are not. Ausimont further argues that the analysis presupposes that

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[12] Pl.s' Br. at 5–10, referencing *CEMEX S.A. v. United States*, 19 CIT 587 (1995), *aff'd after remand results sustained* 133 F.3d 897 (Fed. Cir. 1998); *Mantex, supra*, 17 CIT 1385, 841 F.Supp. 1290; *Laclede Steel Co. v. United States*, 18 CIT 965 (1994), *on remand, supra*, 19 CIT 1076; *Gray Portland Cement and Cement Clinker from Mexico*, 64 Fed. Reg. 13148 (Mar. 17, 1999) (Aug. 31, 1998 Mem. at 4); *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 1328 (Jan. 19, 1996) (Final Rev. Results); *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea*, 57 Fed. Reg. 42942 (Sep. 17, 1992) (Final LTFV Determ.). *Cf. Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27359 (May 19, 1997) (Final Rule) (use of data on varied groups of models for determining constructed value profit would add additional complexity without generating additional accuracy). Ausimont draws particular attention to *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 66 Fed. Reg. 18747 (Apr. 11, 2001) (Final Rev. Results) in which Commerce recently stated:

> We find an examination of individual overrun sales within the pool inappropriate. First, both the Act and the Statement of Administrative Action ("SAA") contemplate an analysis of groups of sales which differ from most sales under consideration. The Act requires an examination of "conditions and practices." This language implies an examination of groups of sales, rather than individual transactions. This understanding is clarified by the SAA, which refers to types of transactions Commerce may consider to be outside the ordinary course of trade. Specifically, the SAA states: "Commerce may consider other *types* of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary when compared to sales of transactions generally made in the same market." SAA at 165 (emphasis added).

Analysis of Overrun Sales for Hyundai Pipe Co., Ltd. (Apr. 5, 2001) at 7–8.

[13] Although Commerce is now using the term "total quantity" rather than "absolute volume," the concepts appear to be the same.

[14] In the decision memorandum incorporated by reference in that decision, Commerce described its history of using relative sales volume as an important factor in its ordinary-course-of-trade analysis before concluding that "it has been our long-standing practice to consider the relative sales volume, along with other factors, in our ordinary-course-of-trade analysis." *Gray Portland Cement and Clinker From Mexico*, 65 Fed. Reg. 13943 (Issues and Decision Memorandum at 13). Ausimont repeats its argument (*see* Slip Op. 01–92 at 16–18) that the long series of *Gray Portland Cement and Clinker From Mexico* decisions stand not only for the proposition that it is Commerce's longstanding practice to consider relative sales volume and frequency, but to accord great weight to those factors. Pls.' Br. at 20, referencing Issues and Decision Memorandum, *id.*, at 12–13 (sales volume, *i.e.* number of transactions and quantity sold, was enough by itself to show that the sales in question were unusual). In the same case, Commerce also rejected the suggestion that it substitute the factor of "absolute volume" for "relative sales volume." *See also Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 66 Fed. Reg. 18747 (Apr. 11, 2001) (Final Rev. Results) (Analysis of Overrun Pipe for Hyundai Pipe Co., Ltd. at 8) (absolute volume provided "no meaningful insight into demand for overrun pipe").

sales of all of the referenced models were made in the ordinary course of trade because Ausimont did not request that certain of them be excluded. Ausimont again argues (*see* Slip Op. 01–92 at 19 n.17) that on its own volition Commerce excluded sales of product code 380550 as "off-spec" and that these were in greater absolute amount, total volume, frequency, and of lower average quantity than the contested sales. Ausimont argues that these circumstances only corroborate that product code 380550 sales are not "representative" of Ausimont's "normal" sales. Ausimont further contends that if Commerce insists on analyzing wet reactor bead as a model of granular PTFE resin then it would have to treat it as an "off-spec" product because wet reactor bead cannot be used for the same purposes as regular, commercial granular PTFE resin.

Regarding average quantity, Commerce acknowledged that the average volume quantity of the wet reactor bead sales was higher than any other granular PTFE resin models but determined that it was "not significantly higher" than the average volume for product code 380127. *Remand Results* at 6. Ausimont asserts that Commerce did not actually consider a comparison of the average quantities of wet reactor bead and product code 380127 but compared highest to lowest sales. Ausimont argues that the average quantity for the contested sales is almost 32 percent higher, a difference that Commerce implicitly found to be "not significantly higher[.]" *See id*. Ausimont argues that Commerce implausibly reasons that "the large difference in the average volume among the individual models of PTFE resin supports the fact that the average volume of wet reactor bead, while higher than the average volume of sales of PTFE resin models, is consistent with the pattern of variation in the average volumes among the different models." *Remand Results* at 6. Ausimont argues that this seems to suggest that there is no "norm" for granular PTFE resin, and that using Commerce's reasoning, it would be just as valid to compare the quantitative factors for wet reactor bead to those granular PTFE resin sales that Commerce excluded as outside the ordinary course of trade, and the seven sales of product code 380550 that were sold to three customers were determined by Commerce to be outside the ordinary course of trade even though they were sold in a greater absolute amount than the wet reactor bead sales, their total volume and frequency were greater, and their average quantity was lower. *Cf.* Slip Op. 01–92 at 16–17.

Regarding price, Commerce denied that the average price for wet reactor bead was unusual because "the price ratios of wet reactor bead to PTFE resin were between [ ] and [ ] percent of approximately [ ] percent of the total PTFE resin models." *Remand Results* at 7. Ausimont argues that once again this says nothing about wet reactor bead in comparison with granular PTFE resin as a whole.

Ausimont also complains that Commerce spends much of its analysis comparing the quantitative factors for the wet reactor bead sales with those of product code 380127 for the purpose of determining whether the wet reactor bead sales fall within the normal range of granular

PTFE resin sales. Ausimont again criticizes Commerce's justification for its conclusions as based on the assumption that the quantitative factors of a single granular PTFE resin model might approximate those for wet reactor bead rather than an accounting of the whole group.[15]

Regarding the market for wet reactor bead, Ausimont criticizes inconsistency in Commerce's argument for, on the one hand, contending that the 1993 determination that there was no market for wet reactor bead is irrelevant on the ground that the statement was not made as part of an ordinary-course-of-trade analysis, while on the other hand attaching great significance to its findings from that determination that the value added to the imported wet reactor bead is small and the process for further-manufacturing granular PTFE resin from that imported wet reactor bead is not complex. The *Remand Results* state that "rather than relying on the findings in previous segments such as the AD Order Circumvention, Commerce has examined the facts of the record of this review and has, independent of prior determinations, concluded that the evidence before it sufficiently merits the finding of a "market[.]" *Id.* at 17. Ausimont argues that in reality, what Commerce has done is ignored "definitive" evidence that there is *no* market for wet reactor bead and proceeded to determine "under an individual model-specific analysis" that the existence of only [ ] sales did not show the lack of a market for wet reactor bead. *Id.* (confidential bracketing added). Ausimont argues that for Commerce to defend its finding of no market for wet reactor bead in Italy on the ground that the finding was made pursuant to an anti-circumvention investigation rather than an ordinary-course-of-trade analysis does not logically render it any less valid than if it had been made as part of an ordinary-course-of-trade analysis, the implication otherwise being that Commerce might have found the existence of a market in 1993 had it been conducting an ordinary-course-of-trade analysis.[16] Ausimont contends that Commerce understates the significance of the 1993 determination by claiming that its "simple statement that it agrees with respondent that there is virtually no market is meaningless for its ordinary course of trade determination in the instant case." *Id.* Ausimont argues that, in fact, the lack of a market for wet reactor bead was what forced Commerce to resort to cost of production for determining value. *See Preliminary Circumvention Determination*, 57 Fed. Reg. 43219 ("[B]ecause there is virtually no market for PTFE wet raw polymer, we have no other source of observed market

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[15] Ausimont further argues that since Commerce's calculations upon remand demonstrate that product code 380127 was sold below the cost of production and that in accordance with 19 U.S.C. § 1677(15) and 19 U.S.C. § 1677b(b)(1) sales of product code 380127 should have been excluded as *per se* outside the ordinary course of trade. However, in accordance therewith, Commerce may include below-cost sales in the analysis. *See, e.g., Torrington Co. v. United States*, 127 F.2d 1027, 1081 (Fed. Cir. 1997) (according to 19 U.S.C. § 1677(15) "an enterprise may indeed make some sales below cost 'in the ordinary course of trade'").

[16] Ausimont further contends that it is disingenuous for Commerce to claim that it did not cite to the two sales of wet reactor bead in the *Final Results* to bolster its conclusion that there is a market for wet reactor bead but only to rebut Ausimont's contention that there is no such market. Ausimont argues that refuting a claim that there is no market for wet reactor bead is the same as arguing that there is a market for wet reactor bead, the flip side of the same coin, and that the "inescapable conclusion" is that Commerce cited the two 1993 sales as proof that there *is* a market for wet reactor bead. Ausimont argues that Commerce has not evaluated all the relevant evidence regarding absence of sales of wet reactor bead by Ausimont in Italy during the period from 1993 through 1997.

prices for PTFE wet raw polymer."). Ausimont asserts that nowhere in the *Remand Results* does Commerce explain why it concluded that there is a market for wet reactor bead, other than to state that one must exist because there were [ ] sales of the product. Pl.s' Br. at 30–31, referencing *Remand Results* at 17 ("under an individual model-specific analysis, the existence of only [ ] sales did not show the lack of market for wet reactor bead") (confidential bracketing added). Lastly. Ausimont contends that Commerce implicitly argues that because there is a market for granular PTFE resin, and sales of certain models of granular PTFE resin are also sold in small frequencies and to only one customer, then there must also be a market for wet reactor bead. *Remand Results* at 17. Ausimont argues that this is "specious reasoning" based entirely upon Commerce's "self-serving" decision to analyze wet reactor bead as a model of granular PTFE resin, and its refusal to consider its 1993 finding that there is no market for wet reactor bead. In the 1993 circumvention determination, Commerce recognized that wet reactor bead is a product that neither Ausimont, nor any one else, normally sells in Italy, and since 1993 Ausimont has made only the [ ] sales at issue here. Ausimont points out that there were no sales of wet reactor bead to others in 1994, 1995, or 1996[17] and that wet reactor bead is not listed as a product for sale in any of Ausimont's product brochures, yet the fact that only one of its [ ] customers who regularly buy granular PTFE resin bought wet reactor bead during the POR was the deciding factor for Commerce. Ausimont contends that Commerce has ignored these other facts, and that if there was a market for wet reactor bead more of the [ ] other granular PTFE resin purchasers would also be purchasing wet reactor bead.

Regarding the terms of sale, Ausimont continues to assert that the terms and conditions for the contested sales differed significantly from those of granular PTFE resin. It argues that the crucial difference between the contested sales and granular PTFE resin sales is that the contested sales were all contingent upon Ausimont's ability to complete the sale and deliver the product, which is why they were so-called "pending" orders. Ausimont argues that its inability to deliver the product on the targeted delivery dates was why three of the four sales documented in OBS 376 were cancelled. Commerce stated that it found no evidence for OBS 81, the other wet reactor bead sale examined at verification, "suggesting that the sales transaction of wet reactor bead was based on a pending order." *Id.* at 12. Yet, Ausimont points out, in the comments at the bottom of that confirmation is written "It can be delivered" in Italian. Ausimont further takes issue with Commerce's inability to distinguish between an "open order," in which it is the customer who may no longer wish to purchase, and a "pending order," in which cancellation is

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[17] Ausimont further objects to Commerce's statement that because Ausimont's responses for the 1994–95 and 1995–96 administrative periods were not verified, it "can not conclude definitely" whether Ausimont sold wet reactor bead in Italy during those periods because of Ausimont's general questionnaire response that "Ausimont SpA also sells wet reactor bead to unrelated customers in the home market." Ausimont resents the implication that its database for those review periods, which showed no home market sales of wet reactor bead, were incomplete. Pl.'s Br. at 31 n.14. *See Remand Results* at Ex. 2–B.

at Ausimont's discretion and depends upon the ability to produce and deliver by the targeted delivery date. Commerce concluded that cancellation of sales is not unique to wet reactor bead sales based on the cancellation of one of the documented granular PTFE resin sales. *Id.* at 13. Ausimont points out that this was only one of 21 sales of granular PTFE resin documented by Commerce at verification that were cancelled. In other words, Ausimont asserts, less than 5 percent of the examined granular PTFE resin sales were cancelled, whereas [ ] out of a total of [ ] wet reactor bead sales were cancelled, *i.e.*, 50 percent. This Court has recognized that cancellation of sales is indicative of sales made outside the ordinary course of trade. *Murata Mfg. Co. v. United States*, 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993). Ausimont argues that the significance here is not simply that the orders were cancelled, but why they were cancelled, which is that Ausimont could not produce and deliver the wet reactor bead by the targeted date, and since the sales of wet reactor bead were highly profitable (on average more than two times the gross profit rate for granular PTFE resin), Ausimont contends that it logically follows that it would not choose to cancel these orders unless it could not meet them.

Ausimont further argues wet reactor bead is the only so-called "granular PTFE resin model" that is *not granular* and is shipped, packed with water and various contaminants and residues, in 700-pound sacks. All "granular" PTFE resin is shipped in drums weighing up to 45 pounds. It argues that all granular PTFE resin sales are priced based upon the weight of the shipped product, a term of sale that "cannot simply be explained away as being a matter of negotiation between Ausimont and its customer," and it also argues that the pricing of wet reactor bead, based upon its dry weight instead of its total shipping weight, is unique to wet reactor bead. Since differences in ordering and shipping are relevant to an ordinary-course-of-trade analysis, *see NSK Ltd. v. United States*, 190 F.3d 1321 (Fed. Cir. 1999), Ausimont argues that Commerce has not adequately addressed why this "model" of granular PTFE resin would be packed and shipped differently.

Regarding its claim of unusual commercial quantities, *see* 19 U.S.C. § 1677(17), Ausimont maintains that an average quantity of wet reactor bead sales that was *five times greater* than that of all other granular PTFE resin sales cannot be considered "usual." It argues that even analyzing wet reactor bead as a "model" of granular PTFE resin shows that the contested sales had an average quantity of almost *32 percent greater* than product code 380127, the model with the next-highest average quantity. *See Remand Results*, at Ex. 1. Whether sales of that product should have been excluded from the analysis, Ausimont argues that at a minimum the fact that it was below cost renders its price suspect and that a 32 percent difference in average quantity must trump the absence of any price-quantity correlation.

Ordinary course of trade analysis "should be guided by the purpose of the ordinary course of trade provision which is to 'prevent dumping

margins from being based on sales which are not representative' of the home market." *CEMEX*, *supra*, 133 F. 3d at 900 (quoting *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988)). Since questionable sales must be compared to what is "normal" for sales of the same class or kind, 19 U.S.C. § 1677(15), ordinary course of trade analysis is handled "on a case-by-case basis by examining all of the relevant facts and circumstances." *CEMEX*, *supra*, 19 CIT at 593. *See CEMEX*, *supra*, 133 F. 3d at 900; *Thai Pineapple Public Co. v. United States*, 20 CIT 1312, 1314, 946 F. Supp. 11, 15 (1996); *Murata Mfg. Co., supra*, 17 CIT at 264, 820 F. Supp. at 607. The factors that Commerce has considered in that analysis include home market demand, volume of home market sales, sales quantity, sales price, profitability, customers, terms of sale and frequency of sales. *See Thai Pineapple*, 20 CIT at 1315, 946 F. Supp. at 16. *See also CEMEX*, 19 CIT at 589–593. Because of the deference afforded to Commerce's methodology in determining whether sales are within or without the ordinary course of trade, it is difficult to prove extraordinary sales by focusing on a single facet of the consideration. *See, e.g., Koenig & Bauer-Albert AG v. United States*, 259 F.3d 1341, 1345 (Fed. Cir. 2001) (high profits alone may be insufficient to establish that sales are outside the ordinary course of trade); *NTN Bearing Corp. v. United States*, 19 CIT 1221, 1227–29, 905 F. Supp. 1083, 1089–91 (1995) (infrequency alone may be insufficient to establish sales as outside the ordinary course of trade without a complete explanation of the facts establishing such sales as extraordinary).

Regarding the quantitative factors, Commerce justified its "individual model" approach by focusing on the fact that the attributes among the finished products vary "widely" and are generally not substitutable or interchangeable. Ausimont is correct to state that by so doing Commerce has minimized the consideration of relevant data that conflicts or detracts from its conclusions, and Ausimont has amplified a number of these, but it would be incorrect to state that Commerce has "totally eliminated" them from consideration. "Ordinary course of trade" goes beyond quantitative analysis into consideration of non-quantitative factors, and the burden of proving sales as a matter of fact as having been made outside the ordinary course of trade rests with the claimant. *See, e.g., Nachi-Fujikoshi Corp. v. United States*, 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992).

The *Remand Results* evince substantial evidence to support Commerce's observations with respect to total volume, frequency, profit, and price. The evidence is less "substantial" with respect to average quantity, since the average quantity of the contested sales was higher than any of the granular PTFE resin models, and Commerce did not, in fact, draw comparisons on the basis of averages with respect to product code

380127.[18] But, given the fact of "wide" variation in average volume of sales among all granular PTFE resin products, from [ ] kilograms to over [ ] kilograms, *Remand Results* at 6, Commerce's "individual model" comparison to the tail end of the data nonetheless amounts to substantial evidence on the record because the Court cannot disagree that a 32 percent difference in average quantity is "too much" in the absence of some reference point to put the comparison in context. *See* Slip Op. 01–92 at 34 (absolute value has no inherent significance). That is likewise true of Ausimont's usual commercial quantities claim.

The *Remand Results* evince marginally "substantial" evidence in support of Commerce's determination that the [ ] contested sales demonstrate the existence of a "market" for this stuff in Italy. The Court acknowledges Commerce's statement in the circumvention determination that it intended to refer to the U.S., not foreign, market in declaring that there was "virtually no market" for wet reactor bead. The Court is therefore not free to conclude the number of sales at issue, obviously small, does not amount to a "market." *See supra*, note 4.

The *Remand Results* also apparently evince "substantial" evidence that the differences in the terms of sales between the product types did not outweigh their similarities. The determination relies on the fact that the terms of both the contested sales and granular PTFE resin did "not reflect a 'commitment to purchase a particular quantity at a set price' after the customer places an order[,]" *Remand Results* at 12, and on the fact that in this matter "canceled transactions, after orders are placed, are not necessarily unique to wet reactor bead sales[,]" *id.* at 13, and on the fact that "[p]rices are negotiated on a case-by-case basis with individual customers" for both wet reactor bead and granular PTFE resin sales, *id.* (brackets in original). The Court cannot state that focusing on "perfected" sales rather than contingent sales was an illogical or an unreasonable exercise of discretion; indeed, the reasons offered for cancellation indicate demand that could not be fulfilled, which in turn, together with the fact that these are repeat, arm's length transactions, tends to strengthen Commerce's finding with respect to the "market" for wet reactor bead by overshadowing the relatively small number of transactions involved. *But see Mantex,* 841 F. Supp. at 1307 ("marginal demand for a product does not by itself indicate sales are outside the ordinary course of trade [but] such a factor is probative of whether sales 'have been normal in the trade'") (quoting 19 U.S.C. § 1677(15)).

CONCLUSION

In the final analysis, taking into consideration the *Remand Results* as a whole, the Court must conclude that Ausimont has not met its burden

[18] For that matter, the concept of a "normal" trade obviously requires reference to a standard. In this matter, Commerce regarded the entire range of data "normal" rather than the mean, median, or mode, and yet it is a fundamental tenet of statistical analysis that the measure of central tendency provides an answer to the question of what the typical value of a variable is. Measures of spread and association address the variability of data, and statistics is suited to measuring variability as well. Variability itself is not a valid reason, at least from a statistical standpoint, for cherry-picking from among the range because statistical integrity emphasizes testing the null hypothesis against *all* data in the particular quantitative analyses, not just selected portions. *See, e.g., Quantitative Data Analysis: An Introduction*, General Accounting Office, Program Evaluation and Methodology Division, Report 10.1.11 (May 1992).

of proving that there is not substantial evidence to support the determination that the contested sales were made not outside the ordinary course of trade or in unusual commercial quantities or that it is otherwise not in accordance with law. In the absence of such proof, the *Remand Results* must be sustained.

(Slip Op. 03–05)

NSK LTD., NSK CORP., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN BOWER CORP., NTN CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 00–04–00141

Plaintiffs and defendant intervenors, NSK Ltd. and NSK Corporation (collectively "NSK"), NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation and NTN Corporation, collectively ("NTN"), and Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results")*, 65 Fed. Reg. 11,767 (Mar. 6, 2000). Defendant-intervenor and plaintiff, The Timken Company ("Timken"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, NSK contends that Commerce unlawfully: (1) used affiliated cost data for purposes other than calculating cost of production and constructed value to (a) run its model-match methodology under 19 U.S.C. § 1677(16), (b) calculate the difmer adjustment under 19 U.S.C. § 1677b(a)(6), and (c) calculate NSK's reported United States inventory carrying costs; and (2) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders.

NTN contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders; (2) used affiliated supplier's cost of production for inputs when it was higher than the transfer price; (3) denied a price-based level of trade adjustment when matching constructed export price sales to sales of the foreign like product; (4) rejected NTN's reported level of trade selling expenses and reallocated NTN's United States indirect selling expenses without regard to level of trade; (5) used Commerce's 99.5% arm's length test to compare NTN's home market selling prices to those of NTN's affiliated and unaffiliated parties; (6) included certain NTN sales that were allegedly outside the ordinary course of trade in the dumping margin and constructed value profit calculations; (7) strictly relied upon the sum-of-deviations methodology for the model match analysis; and (8) added an amount to NTN's selling expenses that was allegedly incurred in financing cash deposits for antidumping duties.

Koyo contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders; (2) applied adverse facts available to Koyo's further manufactured tapered roller bearings; and (3) used Koyo's entered value to establish the assessment rate under 19 C.F.R. § 351.212(b) (1998).

Timken contends that Commerce unlawfully: (1) applied adverse facts available to Koyo's entered values; and (2) permitted NTN to exclude certain expenses attributable to non-scope merchandise from its reported United States selling expenses.

Held: NSK's motion for judgment on the agency record is granted in part and denied in part. NTN's motion for judgment on the agency record is granted in part and denied in part. Koyo's motion for judgment on the agency record is granted in part and denied in part. Timken's motion for judgment on the agency record is denied. Case remanded to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review in accordance with this opinion.

[NSK, NTN and Koyo's 56.2 motions are granted in part and denied in part. Timken's 56.2 motion is denied. Case remanded.]

(Dated January 9, 2003)

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe, Grace W. Lawson and *Joseph A. Konizeski)* for NSK.[1]

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, David G. Forgue and *Beata Kolosa)* for NTN.

Sidley Austin Brown & Wood LLP (Neil R. Ellis, Niall P. Meagher, Lawrence R. Walders, Neil C. Pratt, Leigh Fraiser and *Jennifer Haworth McCandless)* for Koyo.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director, *Michele D. Lynch, Kenneth J. Guido* and *Richard P. Schroeder)*; of counsel: *John F. Koeppen*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

Stewart and Stewart (Terence P. Stewart, William A. Fennell, Geert De Prest, Patrick J. McDonough, Marta M. Prado and *David S. Johanson*) for Timken.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs and defendant intervenors, NSK Ltd. and NSK Corporation (collectively "NSK"), NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation and NTN Corporation (collectively "NTN"), and Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results")*, 65 Fed. Reg. 11,767 (Mar. 6, 2000). Defendant-intervenor and plaintiff, The Timken Company ("Timken"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, NSK contends that Commerce unlawfully: (1) used affiliated cost data for purposes other than calculating cost of production and constructed value to (a) run its model-match methodology under 19 U.S.C. § 1677(16), (b) calculate the difmer adjustment under 19 U.S.C. § 1677b(a)(6), and (c) calculate NSK's reported United States inventory

[1] On June 5, 2000, this Court granted NSK's Consent Motion for Intervention but NSK has not filed any briefs in its capacity as a defendant-intervenor in this action.

carrying costs; and (2) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders.

NTN contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders; (2) used affiliated supplier's cost of production for inputs when it was higher than the transfer price; (3) denied a price-based level of trade adjustment when matching constructed export price sales to sales of the foreign like product; (4) rejected NTN's reported level of trade selling expenses and reallocated NTN's United States indirect selling expenses without regard to level of trade; (5) used Commerce's 99.5% arm's length test to compare NTN's home market selling prices to those of NTN's affiliated and unaffiliated parties; (6) included certain NTN sales that were allegedly outside the ordinary course of trade in the dumping margin and constructed value profit calculations; (7) strictly relied upon the sum-of-deviations methodology for the model match analysis; and (8) added an amount to NTN's selling expenses that was allegedly incurred in financing cash deposits for antidumping duties.

Koyo contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) for outstanding 1976 and 1987 antidumping duty orders; (2) applied adverse facts available to Koyo's further manufactured tapered roller bearings; and (3) used Koyo's entered value to establish the assessment rate under 19 C.F.R. § 351.212(b) (1998).

Timken contends that Commerce unlawfully: (1) applied adverse facts available to Koyo's entered values; and (2) permitted NTN to exclude certain expenses attributable to non-scope merchandise from its reported United States selling expenses.

BACKGROUND

The administrative review at issue involves the period of review ("POR") covering October 1, 1997, through September 30, 1998.[2] Commerce published the preliminary results of the subject reviews on October 1, 1999. *See Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Revoke in-Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, ("Preliminary Results")* 64 Fed. Reg. 53,323. Commerce published the *Final Results* at issue on March 6, 2000. *See* 65 Fed. Reg. 11,767.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

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[2] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*'" *American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera,* 340 U.S. at 488)).

II. Chevron Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron,* 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted). *But see Floral Trade Council v. United States,* 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron,* the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction

of the statute is permissible. *See Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce's All Purpose Use of Affiliated Supplier Costs for Inputs Obtained from NSK's Affiliated Supplier

A. Statutory Background

Normal value ("NV") of subject merchandise is defined as "the price at which the foreign like product is [] sold * * * for consumption in the exporting country * * *." 19 U.S.C. § 1677b(B)(i)(1994). If Commerce determines that the foreign like product is sold at a price less than the foreign like product's cost of production ("COP"), and that the conditions listed in 19 U.S.C. § 1677b(b)(1)(A)–(B) are present, Commerce may disregard such below-cost sales in its calculation of NV. *See* 19 U.S.C. § 1677b(b)(1) (1994).

Commerce calculates the COP of the foreign like product by adding "the cost of materials and of fabrication or other processing * * * employed in producing the foreign like product * * * [with] an amount for selling, general, and administrative expenses * * * [and] all other expenses incidental to placing the foreign like product in * * * shipment." 19 U.S.C. § 1677b(b)(3)(A)–(C) (1994). Section 1677b(f) articulates "special rules" for the calculation of COP and constructed value ("CV") and permits Commerce to disregard an affiliated party transaction when "the amount representing [the transaction or transfer price] does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration," that is, an arms-length or market price. 19 U.S.C. § 1677b(f)(2) (1994). If such "a transaction is disregarded * * * and no other transactions are available for consideration," Commerce shall value the cost of an affiliated party input "based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated," that is, based on arm's-length or market value. *Id.*

Section 1677b(f)(3)'s "major input rule" states that Commerce may calculate the value of the major input on the basis of the data available regarding COP, if such COP exceeds the market value of the input calculated under § 1677b(f)(2). *See* 19 U.S.C. § 1677b(f)(3) (1994). Commerce, however, may rely on the data available only if: (1) a transaction between affiliated parties involves the production by one of such parties of a "major input" to the merchandise produced by the other and, in addition, (2) Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of such input is below the COP. *See* 19 U.S.C. § 1677b(f)(3). For purposes of § 1677b(f)(3), regulation 19 C.F.R. § 351.407(b) (1998) provides that Commerce will value a major input supplied by an affiliated party based on the highest of (1) the actual transfer price for the input; (2) the market value of the input; or (3) the COP of the input. *See also Mannesmannrohren-Werke AG v. United States,* 23 CIT 826, 837, 77 F. Supp. 2d 1302, 1312 (1999) (holding that 19 U.S.C. §§ 1677b(f)(2) and (3), as well as the legislative history of the major input rule, support Commerce's decision to use the highest of transfer price, COP, or market value to value the major inputs that the producer purchased from the affiliated supplier). Accordingly, paragraphs (2) and (3) of 19 U.S.C. § 1677b(f) authorize Commerce, in calculating COP and CV, to: (1) disregard a transaction between affiliated parties if, in the case of any element of value that is required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration; and (2) determine the value of the major input on the basis of the information available regarding COP if Commerce has "reasonable grounds to believe or suspect" that an amount represented as the value of the input is less than its COP. *See Timken Co. v. United States,* 21 CIT 1313, 1327–28, 989 F. Supp. 234, 246 (1997) (holding that Commerce may disregard transfer price for inputs purchased from related suppliers pursuant to 19 U.S.C. § 1677b(e)(2) (1988), the predecessor to 19 U.S.C. § 1677b(f)(2), if the transfer price or any element of value does not reflect its normal value) (citing *NSK Ltd. v. United States,* 19 CIT 1319, 1323–26, 910 F. Supp. 663, 668–70 (1995), *aff'd,* 119 F.3d 16 (Fed. Cir. 1997)).

B. Factual Background

During the POR at issue, Commerce, "pursuant to 19 U.S.C. § 1677b(f), * * * requested NSK to submit affiliated supplier cost data for inputs [NSK] obtained from [NSK's] affiliated supplier." Mem. U.S. Opp. Pls.' Mots. J. Agency R. ("Def.'s Mem.") at 72. Commerce used the affiliated supplier cost data to calculate NSK's COP and CV, and to recalculate NSK's model-match methodology, difmer adjustment and inventory carrying costs. *See id.*

Explaining its methodology, Commerce stated in its *Issues and Decision Memorandum*[3] *("Issues & Decision Mem.")* compiled as an appendix to the *Final Results*, that:

> in accordance with [19 U.S.C. § 1677b(f), Commerce] recalculated NSK's reported TRB-specific COP and CV to reflect the COP of an affiliated party input if the transfer price NSK reported for that input was less than the COP for that input. [Commerce notes that] COP and CV [are composed] of several components. * * * The adjustment [Commerce] made for NSK's affiliated party inputs is actually an adjustment to its reported material costs. Because material costs are a component of the cost of manufacture (COM) and COM is a component of COP and CV, when [Commerce] adjusted NSK's reported material costs, [Commerce] not only recalculated its COP and CV, but [Commerce] * * * recalculated variable [VCOM] and total [TCOM] components of COP and CV as well.

Issues & Decision Mem. at 31.

Therefore, as a result, Commerce resorted to using affiliated supplier cost data for purposes other than calculating COP and CV and explained:

> [Commerce] does not rely on a [NSK's] reported costs solely for the calculation of COP and CV. Rather, [Commerce] employ[s] cost information in a variety of other aspects of [Commerce's] margin calculations. For example, when determining the commercial comparability of the foreign like product in accordance with section [1677(16)] * * *, it has been [Commerce's] long-standing practice to rely on the product-specific VCOMs and TCOMs * * * for [United States] and home[]market merchandise. Likewise, when calculating a difmer adjustment to NV in accordance with section [1677b(a)(6)] * * *, it has been [Commerce's] consistent policy to calculate the adjustment as the difference between the product-specific VCOMs * * * for the [United States] and home[]market merchandise compared * * *. Furthermore, [Commerce] ha[s] permitted [NSK] to calculate [its] reported [inventory carrying costs] on the basis of TCOM.

Id.

C. Contentions of the Parties

NSK asserts that the plain language and legislative history of 19 U.S.C. § 1677b(f) restricts Commerce's use of affiliated supplier cost data in that "Commerce may substitute * * * affiliated supplier cost data[] for affiliated supplier price data," that is, transfer prices between affiliates, only "for purposes of subsections (b) and (e)" of § 1677b(f). Mem. P. & A. Supp. Mot. J. Agency R. ("NSK's Mem.") at 6 (quoting 19 U.S.C. § 1677b(f)). In particular, NSK argues that Commerce violated

[3] The full title of this document is *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of Issues and Decision Memorandum for the 1997–1998 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan* (generally accessible on the internet at http://ia.ita.doc.gov/frn/summary/japan/00-5367-1.txt). Although the parties have included excerpts from this document as attachments to their memoranda to support their claims, the Court, in the interest of clarity, will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents provided by each party.

the law when it used NSK's affiliated supplier cost data to: (1) run its model-match methodology under 19 U.S.C. § 1677(16); (2) calculate the difmer adjustment under 19 U.S.C. § 1677b(a)(6); and (3) calculate NSK's reported United States inventory carrying costs. *See* NSK's Mem. at 3, 6–12; Reply Mem. NSK Supp. NSK's Mot. J. Agency R. ("NSK's Reply") at 2–5.

NSK also argues that, pursuant to *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401 (Fed. Cir. 1994),

> the Court must presume [that 19 U.S.C. § 1677b(f)] means that Commerce may use data gathered pursuant to subsection [§ 1677b(f)] for calculations involving subsections *[§§ 1677b(b) and (e)] only.* * * * That other sections of the statute—specifically subsections [1677(16), 1677b(a)(6), 1677a(d)]—are silent about [whether] the use of affiliated supplier cost data does not nullify the precise language of subsection [1677b(f)].

NSK's Mem. at 7 (emphasis added) (citations omitted). According to NSK, a "statute is passed as a whole * * * and is animated by one general purpose and intent. * * * [E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *Id.* at 7–8 (citation and parenthetical omitted). Consequently, the 19 U.S.C. § 1677b(f) restriction on the use of affiliated supplier cost data applies to all of the provisions of the antidumping law that is, especially, 19 U.S.C. §§ 1677(16), 1677b(a)(6) and 1677a(d). *See id.* at 8. In a footnote, NSK further states that by naming 19 U.S.C. § 1677b(f) "[s]pecial rules for calculation of cost of production and for calculation of constructed value," Congress expressed its intent that affiliated supplier cost data only be used to calculate COP and CV. *See id.* at 7 n.2. NSK also makes reference to Commerce's prior methodology of restricting its use of affiliated supplier data to the calculation of CV. *See id.* at 9. Therefore, NSK requests that Commerce "rerun the model-match methodology, and recalculate the difmer adjustment and [United States] inventory carrying costs, without regard to affiliated supplier cost data collected pursuant to subsections" 19 U.S.C. § 1677b(f)(2) and § 1677b(f)(3). *Id.* at 10.

Commerce alleges that 19 U.S.C. § 1677b(f) does not restrict the use of affiliated supplier cost data to calculating COP and CV since Commerce requires cost data for other purposes.[4] *See* Def.'s Mem. at 69–75. Commerce argues that 19 U.S.C. §§ 1677(16), 1677b(a)(6)[5] and 1677a(d) do not prohibit Commerce from using affiliated supplier cost data. *See id.* at 73. Moreover, Commerce alleges that §§ 1677(16), 1677b(a)(6) and

[4] In Commerce's *Issues & Decision Mem.*, Commerce explains how material costs are a component of VCOM and TCOM which in turn, are both components of COP and CV. *See Issues & Decision Mem.* at 31. Therefore, when Commerce adjusted NSK's reported material costs, it not only calculated COP and CV, but also recalculated VCOM and TCOM. *See id.* In turn, since Commerce relies upon VCOM and/or TCOM in running its model-match methodology, calculating the difmer adjustment and inventory carrying costs, Commerce asserts that its use of affiliated supplier cost data for purposes other than the calculation of COP and CV was reasonable and in accordance with law. *See id.* at 31–32.

[5] The Court assumes that Commerce is referring to 19 U.S.C. § 1677b(a)(6) (1994) and not 19 U.S.C. § 1677a(a)(6) (1994).

1677a(d) grant Commerce discretion. *See id.* at 69–75. In particular, Commerce points out that

> [section 1677(16)] does not specify a particular methodology for determining appropriate matches. Rather, the statute implicitly delegates the selection of an appropriate methodology to [Commerce].
>
> Likewise, section [1677b(a)(6)] grants [Commerce] the same discretion to determine a suitable method to calculate a difmer adjustment and does not restrict our selection of an appropriate methodology to any particular approach. In addition, with respect to [Commerce's] recalculation of NSK's [United States inventory carrying costs], section [1677a(d)] only specifies what adjustments are to be made to determine [constructed export price] and does not provide details regarding the precise calculations for each particular adjustment.

Issues & Decision Mem. at 32.

> [I]f [Commerce] determine[s] a component of a respondent's COP and CV to be distortive for one aspect of [Commerce's] analysis, it would be illogical and unreasonable not to make the same determination with respect to those other aspects of [Commerce's] margin calculations where [Commerce] relied on the identical cost data. To do so would not only produce distortive results, but would be contrary to [Commerce's] mandate to administer the dumping law as accurately as possible.

Id. at 31.

Commerce further argues that the plain language of § 1677b(f) does not prohibit the use of affiliated supplier cost data for purposes other than the calculation of COP and CV. *See* Def.'s Mem. at 73. In sum, Commerce maintains that the use of affiliated supplier cost data is not restricted only to the calculation of COP and CV. Rather, Commerce asserts that Commerce has been afforded discretion to use cost data for other purposes. *See id.* at 73–75.

Timken generally agrees with Commerce's arguments and states that Congressional intent directs Commerce to use the most "accurate cost data" to determine CV and COP. *See* The Timken Co.'s Resp. R. 56.2 Mots. J. Agency R. of NTN, Koyo, & NSK ("Timken's Resp.") at 7. Accordingly, Timken maintains that it is not against such intent to use the same information to implement other statutory provisions. *See id.* Timken asserts that Commerce "must administer the dumping laws as accurately as possible * * * [and the] use [of] inaccurate data *(unadjusted* to account for inaccuracies attributable to related-party transfers)" clearly counters Congressional intent. *Id.* (emphasis added).

D. Analysis

The issue presented by NSK is whether Commerce can use affiliated supplier cost data obtained pursuant to 19 U.S.C. § 1677b(f) for purposes other than the calculation of COP and CV. In particular, the Court must determine whether Commerce's use of affiliated supplier cost data to: (1) run its model-match methodology under 19 U.S.C. § 1677(16);

(2) calculate the difmer adjustment under 19 U.S.C. § 1677b(a)(6); and (3) calculate NSK's reported United States inventory carrying costs was in accordance with law.

In *NTN Bearing Corp. of Am. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1257, 1302–04 (2002) *("NTN 2002"),* this Court upheld Commerce's use of affiliated supplier cost data for purposes other than the calculation of COP and CV. Specifically, the Court held that the "statute, read as a whole, does not show Congressional intent to restrict the use of affiliated supplier cost data solely to COP and CV calculations and in effect, tie the hands of Commerce while parties could distort dumping margins with impunity." *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1303.

Since Commerce's methodology to use NSK's affiliated supplier cost data for purposes other than the calculation of COP and CV and the parties arguments are practically identical to those presented in *NTN 2002,* the Court adheres to its reasoning in its prior holding. The plain language of 19 U.S.C. § 1677b(f) neither restricts Commerce from using affiliated supplier cost data for purposes other than the calculation of COP or CV, nor does it indicate Congress's intent that Commerce be prohibited from using such data to calculate accurate dumping margins. *See id.* at ____, 186 F. Supp. 2d at 1303. Accordingly, this Court finds that Commerce's use of NSK's affiliated cost data for purposes other than the calculation of COP and CV was reasonable and in accordance with law.

II. Commerce's Duty Absorption Inquiry for a Transition Order

A. Background

Title 19, United States Code, § 1675(a)(4) (1994) provides that during an administrative review initiated two or four years after the publication of an antidumping duty order, Commerce, at the request of a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter." Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c) (1994), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D) (1994).

On December 15, 1998, Timken requested Commerce to conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) with respect to NSK, NTN and Koyo to ascertain whether antidumping duties had been absorbed during the POR at issue. *See Issues & Decision Mem.* at 2. In the *Final Results,* Commerce determined that duty absorption had occurred for the POR. *See Final Results,* 65 Fed. Reg. at 11,768.

In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders," as

defined in 19 U.S.C. § 1675(c)(6)(C) (antidumping duty orders, *inter alia,* orders issued on or after January 1, 1995), regulation 19 C.F.R. § 351.213(j) (1998) provides that Commerce "will make a duty-absorption determination, if requested, for any administrative review initiated in 1996 or 1998." *Issues & Decision Mem.* at 2. Commerce concluded that: (1) because the antidumping duty orders on tapered roller bearings ("TRBs") in this case have been in effect since 1976 and 1987, the orders are transitional pursuant to 19 U.S.C. § 1675(c)(6)(C); and (2) since these reviews were initiated in 1998, Commerce had the authority to make duty absorption inquiries for the administrative reviews of the 1976 and 1987 antidumping duty orders. *See id.* at 4.

B. Contentions of the Parties

NSK, NTN and Koyo contend that Commerce lacked statutory authority under 19 U.S.C. § 1675(a)(4) to conduct a duty absorption inquiry for the POR of the outstanding 1976 and 1987 antidumping duty orders. *See* NSK's Mem. at 4, 10–15; NSK's Reply at 5–8; Pl. NTN's Mot. & Mem. Supp. J. Agency R. ("NTN's Mem.") at 13–14; Mem. P. & A. Supp. Mot. Pls. Koyo J. Agency R. ("Koyo's Mem.") at 8–14; Reply Br. Pls. Koyo Supp. Mot. J. Agency R. ("Koyo's Reply") at 2–7.

Commerce argues that these reviews fall within its statutory authority because they involve transition orders. *See Issues & Decision Mem.* at 2; Def.'s Mem. at 10–14; NSK's Mem. at 4; NTN's Mem. at 13; Koyo's Mem. at 8. Specifically, Commerce argues that it: (1) properly construed 19 U.S.C. §§ 1675(a)(4) and (c) as authorizing it to make a duty absorption inquiry for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology for determining duty absorption. *See* Def.'s Mem. at 19–22. Commerce also urges the Court to reconsider its holding in *SKF USA Inc. v. United States,* 24 CIT ____, 94 F. Supp. 2d 1351 (2000). *See id.* at 14–19. Timken supports Commerce's contentions but offers no substantive explanation of its position and instead refers to its arguments raised in *SKF USA Inc.,* 24 CIT ____, 94 F. Supp. 2d 1351. *See* Timken's Resp. at 5–6; *see also* Koyo's Reply at 6 n.6.

C. Analysis

In *SKF USA Inc.,* 24 CIT ____, 94 F. Supp. 2d 1351, this Court determined that Commerce lacked statutory authority under 19 U.S.C. § 1675(a)(4) to conduct a duty absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. *See id.* at ___, 94 F. Supp. 2d at 1357–59; *see also NTN Bearing Corp. v. United States,* 295 F.3d 1263 (Fed. Cir. 2002). The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *SKF USA Inc.,* 24 CIT at ____, 94 F.Supp. 2d at 1359 (citing § 291 of the URAA).

Because Commerce's duty absorption inquiry, its methodology and the parties' arguments are practically identical to those presented in *SKF USA Inc.,* the Court adheres to its reasoning in *SKF USA Inc.* The

statutory scheme clearly provides that the inquiry must occur in the second or fourth administrative review after the publication of the antidumping duty order, not in any other review, and upon the request of a domestic interested party. Accordingly, the Court finds that Commerce did not have statutory authority to undertake a duty absorption investigation for the antidumping duty orders in dispute here. The Court remands this case to Commerce with instructions to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review in accordance with this opinion.

III. Commerce's Use of Affiliated Supplier's Cost of Production for Inputs When the Cost Was Higher than the Transfer Price for NTN

A. Background

During the POR at issue, Commerce used the higher of the transfer price or actual cost in calculating COP and CV in situations involving inputs that NTN had obtained from affiliated producers. *See Issues & Decision Mem.* at 28–29; *see also* NTN's Mem. at 15; Pl. NTN's Reply Def. & Def.-Intervenor's Feb. 16, 2001 Mem. Opposing Pls.' Mot. J. Agency R. ("NTN's Reply") at 7. Commerce explained its decision as follows:

> Section [1677b(f)(2) of title 19 U.S.C.] directs [Commerce] to disregard transactions between affiliated parties if such transactions do not fairly reflect amounts usually reflected in sales of merchandise under consideration in the market under consideration. Further, * * * [C.F.R. §§] 351.407(a) and (b) of [Commerce's] regulations set[] forth certain rules that are common to the calculation of CV and COP. This section states that for the purpose of [§ 1677b(f)(3), * * * Commerce] will determine the value of a major input purchased from an affiliated person based on the higher of: 1) the price paid by the exporter or producer to the affiliated person for the major input; 2) the amount usually reflected in sales of the major input in the market under consideration; or 3) the cost to the affiliated person of producing the major input. [Commerce adds that it has] relied on this methodology in [other reviews[6] and that the] * * * methodology has been upheld by the Court in *Mannesmannrohren-Werke [AG] v. United States,* [23 CIT 826, 77 F. Supp. 2d 1302].

Issues & Decision Mem. at 29.

In the case at bar, Commerce requested that NTN provide a list of inputs used to produce the subject merchandise and to identify those inputs that were provided to NTN by its affiliated suppliers. *See* Def.'s Mem. at 30. NTN provided Commerce with exhibits and indicated that it used transfer price in computing COP and CV. *See id.* at 30–31. In cal-

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[6] In particular, Commerce refers to its methodology in *Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom*, 64 Fed. Reg. 35,590, 35,612 (July 1, 1999), *Notice of Final Determination of Sales at Less Than Fair Value of Stainless Steel Round Wire from Taiwan*, 64 Fed. Reg. 17,336 (Apr. 9, 1999), *Final Results of Antidumping Duty Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 63 Fed. Reg. 63,860, 63,868 (Nov. 17, 1998), and *Final Results of Antidumping Duty Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 63 Fed. Reg. 2558, 2573 (Jan. 15, 1998).

culating COP and CV, Commerce adhered to its past methodology and used the higher of transfer price or the actual cost for NTN's affiliated party inputs. *See Issues & Decision Mem.* at 29.

B. Contentions of the Parties

NTN alleges that Commerce erroneously used the affiliated supplier's COP for inputs when it was higher than the transfer price. *See* NTN's Mem. at 3, 15–16; NTN's Reply at 16–18. Specifically, NTN maintains that Commerce misapplied the major input rule described in 19 U.S.C. § 1677b(f)(3) (1994), and that Commerce failed to point to any reasonable grounds on which Commerce based its belief that NTN's reported COP of affiliated parties was below the actual COP. *See* NTN's Mem. at 15–16. According to NTN, a plain language reading of 19 U.S.C. § 1677b(f) makes clear that "the automatic recalculation of reported COP and CV data contemplated in 19 C.F.R. § 351.407 is not contemplated in the statute itself." *Id.* at 16 (distinguishing *Mannesmannrohren-Werke AG,* 23 CIT 826, 77 F. Supp. 2d 1382). NTN requests that if this Court should sustain Commerce's methodology as reasonable and in accordance with law, the Court then remands this issue to Commerce to rectify the ministerial error committed in calculating "a variable * * * to account for the difference between transfer price and actual cost." *Issues & Decision Mem.* at 28; *see* NTN's Mem. at 17–18; NTN's Reply at 9.

Commerce contends that it acted in accordance with the statutory mandate and applied the provision reasonably under the circumstances. *See* Def.'s Mem. at 29–31. Timken supports Commerce's position and adds that "commercial reality" dictates that sales below cost are usually not at market prices. *See* Timken's Resp. at 17. According to Timken, "home market sales of merchandise used to determine normal values which are below cost are by statute 'outside the ordinary course of trade.'" *Id.* (citation omitted).

C. Analysis

The issue presented by NTN is whether Commerce has statutory authority to use the higher of the transfer price or actual cost in calculating COP and CV in situations involving inputs that NTN had obtained from affiliated producers. In *NSK Ltd. v. United States,* 26 CIT ____, 217 F. Supp. 2d 1291 (2002) ("NSK 2002"), this Court affirmed Commerce's decision to use NTN's affiliated supplier's COP for major inputs when COP was higher than the transfer price. The Court reasoned that 19 U.S.C. § 1677b(b)(3)(A)[7] is to be read in conjunction with the Special Rules cited in §§ 1677b(f)(2) and (3) that authorize Commerce, in calculating COP and CV, to: (1) disregard a transaction between affiliated persons if the amount representing an element does not fairly depict the amount usually reflected in sales of merchandise under consideration in the market under consideration; and (2) determine the value of the ma-

[7] Section 1677b(b)(3)(A) sets out that Commerce shall calculate COP by adding: (1) the cost of materials and of fabrication; and (2) an amount for selling, general, and administrative expenses; and (3) the cost of all expenses incidental to placing a foreign like product in condition ready for transit.

jor input on the basis of the information available regarding COP if Commerce has reasonable grounds to believe or suspect that an amount represented as the value of the input is less than the COP of the input.

In determining whether transaction prices between affiliated persons fairly reflect the market, this Court acknowledged that Commerce's practice has been to compare the transaction prices with market prices charged by unrelated parties. Commerce's practice was later reduced to writing in 19 C.F.R. § 351.407 (1998), a regulation which implements 19 U.S.C. § 1677b(f). Commenting on the regulation, Commerce stated that it

> believes that the appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices to or from unaffiliated parties. This practice is the most reasonable and objective basis for testing the arm's length nature of input sales between affiliated parties, and is consistent with [19 U.S.C. § 1677b(f)(2].

Def.'s Mem. at 27 n.6 (citation omitted).

Pursuant to the major input rule contained in 19 U.S.C. § 1677b(f)(3), in calculating COP or CV, Commerce values a major input purchased from an affiliated supplier using the highest of the following: (1) the transfer price between the affiliated parties; (2) the market price between unaffiliated parties; and (3) the affiliated supplier's COP for the major input, since, in Commerce's view, the affiliation between the respondent and its suppliers "creates the potential for the companies to act in a manner that is other than arm's length" and gives Commerce reason to analyze the transfer prices for major inputs. Def.'s Mem. at 28 (citing *Final Results of Antidumping Duty and Administrative Review of Silicomanganese From Brazil,* 62 Fed. Reg. 37,869, 37,871–72 (July 15, 1997)). In addition, if Commerce disregards sales that failed the below-cost sales test pursuant to 19 U.S.C. § 1677b(b)(1) in the prior review with respect to merchandise of the respondent being reviewed, Commerce has "reasonable grounds to believe or suspect" that sales under consideration might have been made at prices below the COP. *See* 19 U.S.C. § 1677b(b)(2)(A)(ii) (1994).

Commerce disregarded sales that failed its cost test under 19 U.S.C. § 1677b(b) during the previous review with respect to NTN's merchandise. *See* Def.'s Mem. at 29. For this reason, Commerce concluded that it had reasonable grounds to believe or suspect that sales of the foreign like product under consideration may have been made at prices below the COP. *See* 19 U.S.C. § 1677b(b)(2)(A)(ii). Therefore, Commerce initiated a COP investigation of sales by NTN in the home market. *See Preliminary Results,* 64 Fed. Reg. at 53,327; *see also* Def.'s Mem. at 30. As part of its investigation, Commerce distributed a questionnaire, which, in pertinent part, requested NTN to provide COP and CV information. *See* Def.'s Mem. at 30. Specifically, Commerce requested NTN to: (1) list all inputs used to produce the merchandise under review; (2) identify those inputs that NTN received from affiliated persons; (3) provide the

per unit transfer price charged for the input by the affiliated producer; (4) provide the COP incurred by the affiliated person in producing the major input; and (5) specify the basis used by NTN to value each major input for purposes of computing the submitted COP and CV amounts. *See id.* In response, NTN referred Commerce to a number of NTN's exhibits and stated, among other things, that transfer price was used in computing COP and CV. *See* Def.'s Mem. Ex. 1 (proprietary version). NTN also indicated that it used the transfer price for computing COP and CV. *See id.* at 31. Therefore, consistent with its interpretation of 19 U.S.C. §§ 1677f(2) and (3), Commerce used the higher of the transfer price or the actual cost in calculating COP and CV in the situations where NTN used parts purchased from affiliated persons. *See id.*

While NTN argues that there is no record evidence that the affiliated party inputs did not "reflect the amount usually reflected in [the] sales of * * * merchandise * * * under consideration" and that the statute makes no reference to cost, NTN's Mem. at 16 (relying on 19 U.S.C. § 1677b(f)(2)), the Court holds that Commerce acted reasonably and in accordance with 19 U.S.C. § 1677b(f)(3) when it chose to determine the value of a major input on the basis of the information available regarding COP. *See NSK 2002*, 26 CIT at ____, 217 F. Supp. 2d at 1320–22; *see also SKF USA Inc. v. United States*, 24 CIT ____, ____ 116 F. Supp. 2d 1257, 1261–68 (2000).

NTN argues that even if Commerce was correct in adjusting NTN's COP and CV for affiliated party inputs, Commerce committed a ministerial error in the calculation of this adjustment in that Commerce's methodology failed to capture NTN's actual cost accurately. *See* NTN's Mem. at 17. According to NTN, Commerce's methodology erred by making an adjustment for the difference between transfer price and supplier's actual cost, rather than between supplier's actual cost and NTN's actual cost. *See Issues & Decision Mem.* at 28; NTN's Mem. at 17; Def.'s Mem at 34; *see also* NTN's Reply at 9. Commerce notes that

> NTN calculated variances by comparing its standard costs to its actual costs which are, for all inputs it purchased from all suppliers, based on the transfer prices from each supplier. As a result, the affiliate's costs * * * are based on transfer prices. Therefore, *NTN's reported actual costs are not an accurate basis on which to calculate COP and CV.* Thus, it was appropriate to use the supplier's actual cost, and also to make an adjustment for the difference between the supplier's actual cost and the transfer price when the supplier's actual cost was higher than the transfer price.

Issues & Decision Mem. at 29–30 (emphasis added). Commerce further asserts that the "variances" to which NTN refers are based upon the transfer price of affiliated suppliers, and not the actual cost of the input to affiliated suppliers. Accordingly, the Court agrees that NTN's reported actual costs cannot be an accurate basis upon which to calculate COP and CV. It is not the role of this Court to determine what methodology Commerce should or should not use in its determination, but instead to decide whether Commerce's chosen methodology is reason-

able. "[Commerce] is given discretion in its choice of methodology as long as the chosen methodology is reasonable and [Commerce's] conclusions are supported by substantial evidence in the record." *Federal-Mogul Corp. v. United States,* 18 CIT 785, 807–08, 862 F. Supp. 384, 405 (1994) (citing *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987)); *see also Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 936 (Fed. Cir. 1984) (stating that "[the Court's] role is limited to deciding whether [Commerce's] decision is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law'"). After careful examination of the record of this case and NTN's assertion that Commerce's methodology is distortive, this Court sustains Commerce's methodology in using NTN's supplier's actual cost.

IV. Commerce's Denial of a Price-Based Level of Trade Adjustment

A. Contentions of the Parties

NTN contends that Commerce improperly denied a price-based level of trade ("LOT") adjustment when matching constructed export price ("CEP") sales to sales of the foreign like product,[8] citing *Borden Inc. v. United States,* 22 CIT 233, 4 F. Supp. 2d 1221 (1998), as support. *See* NTN's Mem. at 18–21. *See generally Borden,* 22 CIT 233, 4 F. Supp. 2d 1221, *rev'd,* 2001 WL 312232 (Fed. Cir. Mar. 12, 2001). In particular, NTN argues, *inter alia,* that Commerce incorrectly determined NTN's CEP LOT because Commerce failed to use the sale to the first unaffiliated purchaser in the United States to determine NTN's CEP LOT. *See Issues & Decision Mem.* at 35; NTN's Mem. at 19–21. NTN requests that the Court remand the LOT issue to Commerce to grant NTN a price-based LOT adjustment when its CEP LOT is different from the LOT of the comparison foreign like product. *See* NTN's Mem. at 21.

Commerce, in turn, argues that it properly determined the LOT for NTN's CEP sales based upon the CEP. *See* Def.'s Mem. at 35–36. Commerce used the CEP price to determine the LOT of CEP sales, and found that NTN had "no home market level of trade equivalent to the CEP level of trade because there were significant differences between the selling activities associated with the CEP and those associated with each of the home market [LOTs]." Id. at 35; *see also* NTN's Mem. App. 5 at 6–7. Commerce points out that CEP is defined in 19 U.S.C. § 1677a(b) (1994) as the price at which the subject merchandise is first sold in the United States by a seller affiliated with the producer to an unaffiliated purchaser, as adjusted under §§ 1677a(c) and (d). *See* Def.'s Mem. at 39. According to Commerce, the adjusted CEP price is to be compared to prices in the home market based on the same LOT whenever it is practicable; when it is not practicable and the LOT difference affects price comparability, Commerce considers making a LOT adjustment. *See id.* at 39–40. Commerce makes a CEP offset when Commerce is not able to quantify

[8] For a complete discussion of background information and the statutory provisions at issue, the reader is referred to this Court's decision in *NTN Bearing Corp. of Am. v. United States,* 24 CIT ___, ___, 104 F. Supp. 2d 110, 125–128 (2000).

price differences between the CEP LOT and the LOT of the comparison sales, and if NV is established at a more advanced state of distribution than the CEP LOT. *See id.* at 41.

Commerce claims that it applied its usual methodology to determine CEP LOT and determined that NTN's LOT and home market LOT were not equivalent. *See id.* at 43. According to Commerce, "in order to calculate a [LOT] adjustment, the CEP [LOT] must exist in the home market." *Id.* Since there was a difference between NTN's LOT and home market CEP LOT, Commerce "could not determine a [LOT] adjustment based upon NTN's home market sales of merchandise under review." *Id.; Issues & Decision Mem.* at 36. Alternatively, Commerce calculated "NV at the same [LOT] as the [United States] sale] to the unaffiliated customer and, when comparisons were to sales at a different [LOT], made a CEP offset * * *." Def.'s Mem. at 43 (citing NTN's Mem. App. 5 at 6–7). Commerce contends that NTN provided no further information to establish a basis for calculating a LOT adjustment. *See id.* Timken generally agrees with Commerce's positions and adds that the Court should uphold Commerce's methodology since NTN admits that "transfer price was used in computing COP and CV" in its answer to Commerce's questionnaire. Timken's Resp. at 17 (referring to Def.'s Mem. Ex. 1 at 64).

B. Analysis

In *Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") held that the plain text of the antidumping statute and the Statement of Administrative Action ("SAA")[9] require Commerce to deduct the expenses enumerated under 19 U.S.C. § 1677a(d) before making the LOT comparison.[10] The court examined 19 U.S.C. § 1677b(a)(1)(B)(i) (1994), which provides that Commerce must establish NV "to the extent practicable, at the same level of trade as the export price or [CEP]," and 19 U.S.C. § 1677a(b), which defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States * * * *as adjusted under subsections (c) and (d) of this section.*" (emphasis added). The court concluded that "[r]ead together, these two provisions show that Commerce is required to deduct the subsection (d) expenses from the starting price in the United States before making the level of trade comparison. * * *" *Micron*, 243 F.3d at 1315. The court further stated that this conclusion is mandated by the SAA, which states that "'to the extent practicable, [Commerce should] establish normal value based on home market (or third country) sales at the same level of trade *as the*

[9] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.; see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application").

[10] The CAFC's decision effectively overturned the Court of International Trade's determination with respect to this issue in *Borden*, 22 CIT 233, 4 F. Supp. 2d 1221, a case discussed by the parties in the instant matter.

constructed export price or the starting price for the export price.'" Id. (citing SAA at 829) (emphasis in original).

In its reply brief, NTN acknowledges the *Micron* decision but asserts that the CAFC's interpretation of the relevant subsections under 19 U.S.C. § 1677b (1994) conflicts with the URAA, "which requires [Commerce] to make a LOT adjustment if the difference in the level of trade affects price comparability, based on a pattern of consistent price differences." NTN's Reply at 7 (citations omitted). Despite this opposition, this Court adheres to its reasoning in *NTN 2002,* 26 CIT at ____, 186 F. Supp. 2d at 1265–66, and finds that Commerce properly made § 1677a(d) adjustments to NTN's starting price in order to arrive at CEP and make its LOT determination. The Court also finds that Commerce's decision to deny NTN a LOT adjustment is supported by substantial evidence. Section 1677b(a)(7)(A) permits Commerce to make a LOT adjustment "if the difference in level of trade * * * involves the performance of different selling activities[] and * * * is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined." 19 U.S.C. § 1677b(a)(7)(A). Yet, Commerce does not make a LOT adjustment when the record at issue does not provide adequate evidence to support such an adjustment. *See Issues & Decision Mem.* at 35. For this POR, Commerce examined the record and concluded that NTN's home market LOT was not equivalent to its CEP LOT. *See id.* Furthermore, "Commerce had no other information that provided an appropriate basis for determining a [LOT] adjustment." Def.'s Mem. at 43. *See generally* SAA at 830. "As a result, because the record [failed] to establish that there [wa]s any pattern of consistent price differences between the relevant LOTs, [Commerce] did not make a LOT adjustment for NTN when [Commerce] matched a CEP sale to a sale of the foreign like product at a different LOT." *Issues & Decision Mem.* at 35. Accordingly, the Court finds that Commerce acted within the directive of the statute in denying NTN the LOT adjustment and instead, granting a CEP offset. *See* 19 U.S.C. § 1677b(a)(7).

V. Commerce's Reallocation of NTN's United States Indirect Selling Expenses Without Regard to Levels of Trade

A. Background

In the *Final Results,* 65 Fed. Reg. at 11,767, Commerce calculated NTN's United States and home market selling expenses without regard to LOT. *See Issues & Decision Mem.* at 36–38. NTN argued that Commerce should have relied on NTN's reported United States and home market selling expenses based on LOT instead of reallocating these selling expenses without regard to LOT. *See id.* at 36. Furthermore, NTN claims that Commerce's rejection of NTN's reported LOT selling expenses "contradicts the evidence on the record in this review [since Commerce concluded] in the *[P]reliminary [R]esults* * * * that different LOTs existed in both the [United States] and home markets for sales of

subject merchandise." *Id.* at 36–37. NTN also points to data[11] it supplied Commerce in response to Commerce's questionnaire illustrating that United States original equipment manufacturer ("OEM") sales incurred higher selling expenses than both past market and distributor sales, and that distributor sales incurred higher selling expenses than post market sales. *See id.* at 37. "NTN states that home market expenses also can be identified by LOT and argues that [Commerce's] reallocation [of NTN's United States indirect selling expenses] without regard to LOT is distortive." *Id.* Timken, in turn, contends that the evidence on the record supports Commerce's reallocation of NTN's home market and United States indirect selling expenses without regard to LOT. *See id.* Timken asserts that NTN has not adequately shown that its allocations accurately reflect the manner in which NTN incurs expenses for its sales, and thus Commerce should not alter its methodology of reallocating NTN's home market and United States selling expenses without regard to LOT. *See id.*

Commerce generally agrees with Timken. *See Issues & Decision Mem.* at 37–38. Commerce responded that for a majority of the expenses under this POR, it determined that NTN's methodology for allocating its selling expenses based on LOTs did not bear any relationship to the manner in which NTN incurred these United States and home market selling expenses and its methodology led to distorted allocations. *See id.* at 37. Commerce asserts that in *Timken Co. v. United States*, 20 CIT 645, 653, 930 F. Supp. 621, 628–29 (1996), Commerce was to accept "NTN's LOT-specific allocations and per-unit LOT expense adjustment amounts only if NTN's expenses demonstrably varied according to LOT." *Id.* Acting in accordance with *Timken Co.*, Commerce in its remand results did not allow NTN's LOT-specific allocations "due to the lack of quantitative and narrative evidence on the record demonstrating that the expenses in question demonstrably varied according to LOT. * * *" *Issues & Decision Mem.* at 38. Commerce argues that after careful review of the administrative record for this POR, it finds that "in most instances no evidence exists demonstrating that NTN's home market and [United States] expenses allocated by LOT actually varied according to LOT." *Id.* Commerce further concluded that the data provided by NTN in its response to Commerce's questionnaire indicates that NTN incurred certain United States packing material and packing labor expenses when selling to only one United States's LOT. *See id.; see also* Def.'s Mem. at 45 n.12. After reviewing NTN's response to its questionnaire, Commerce found that NTN clearly indicates that "certain of NTN's packing expenses individually differed by LOT." *Issues & Decision Mem.* at 38.

> Because these expenses were unique to a single LOT, NTN 1) allocated each total expense amount solely to this LOT[;] 2) calculated a single allocation ratio for this LOT[;] and 3) applied this ratio only

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[11] Specifically, NTN refers to Exhibit C–7 of its February 11, 1999 response to Commerce's questionnaire. *See Issues & Decision Mem.* at 37.

> to [United States] sales at this LOT * * *. Therefore, for [the *Preliminary Results*, 64 Fed. Reg. 53,323, Commerce] applied [Commerce's] recalculated ratios for certain of NTN's [United States] packing and [United States] labor expenses only for sales to the one LOT for which these expenses were incurred.

Id. After further review, Commerce also concluded that NTN's United States packing labor and material expenses varied with regard to LOT. *See id.* According to specific data[12] provided by NTN, Commerce points out that NTN's different methods of packing depend upon LOT. *See id.* Commerce states that since NTN has provided no further record evidence that home market expenses were incurred differently depending on LOT, Commerce properly accepted only NTN's allocation of home market packing expenses according to LOT. *See id.*

B. Contentions of the Parties

NTN contends that Commerce's decision to reallocate NTN's selling expenses violates Commerce's mandate to administer the antidumping laws. *See* NTN's Mem. at 24–27. NTN states that Commerce is in error primarily because: (1) "the expenses in question varied across [LOTs] in keeping with the requirements of *[Timken Co.*, 20 CIT 645, 930 F. Supp. 621; (2)] NTN's methodology was previously accepted by [Commerce] and has not changed[; and (3)] the effect of reallocating these expenses is to void [Commerce's] LOT determination * * *." *Id.* at 24 (citations omitted). Moreover, NTN argues that Commerce erred in basing its decision to reallocate NTN's reported expenses on the conclusion that the expense methodology NTN employed "bore no relationship to the manner in which the expense[s were] incurred." *Id.* According to NTN, sufficient record evidence exists for Commerce to find that NTN's indirect and home market selling expenses varied with regard to LOT.[13] *See id.* at 24–25. Citing to *Böwe-Passat v. United States*, 17 CIT 335, 340 (1993), NTN argues that Commerce's reallocation of NTN's United States indirect selling expenses without regard to LOT is contrary to Commerce's statutory role of administering the antidumping law to the most accurate extent possible. *See id.* at 27.

Commerce responds that no sufficient record evidence exists illustrating that all of NTN's United States selling expenses and home market selling expenses varied demonstrably with regard to LOT. *See* Def.'s Mem. at 45–46. Commerce refers to the holdings in *NTN Bearing Corp. of Am. v. United States*, 23 CIT 486, 83 F. Supp. 2d 1281 (1999) and *NTN Bearing Corp. of Am. v. United States*, 19 CIT 1221, 905 F. Supp. 1083 (1995) and asserts that this Court uphold Commerce's reallocation of NTN's United States and home market indirect selling expenses without regard to LOTs. *See id.* at 46.

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[12] Specifically, Commerce refers to exhibits B–6 and pages A–9 and A–15 of NTN's February 9, 1999 response to Commerce's questionnaire. *See Issues & Decision Mem.* at 38.

[13] NTN points to various exhibits provided to Commerce in response to Commerce's questionnaire regarding NTN's selling expenses among varied LOTs. *See* NTN's Mem. at 25 (proprietary version).

Timken generally supports Commerce's arguments and argues that the record evidence supports Commerce's decision to reject NTN's allocation of United States and home market indirect selling expenses. *See* Timken's Resp. at 18 (citing *Issues & Decision Mem.* at 37–38). Furthermore, Timken contends that it has been Commerce's practice to reject NTN's methodology for reporting selling expenses in various reviews. *See id.* (citing *Final Results of Antidumping Duty Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 63 Fed. Reg. 63,860 (Nov. 17, 1998), and *Final Results of Antidumping Duty Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 63 Fed. Reg. 2558 (Jan. 15, 1998).

NTN replies to Commerce and Timken's assertions by stating that neither has brought forth any substantial legal argument that supports Commerce's decision to adjust NTN's sales for selling expenses without regard to LOT. *See* NTN's Reply at 9–10. NTN also proposes that Commerce failed to address the record in this POR, and asserts that precedent makes clear that "the record for each administrative review is separate from, and independent of, each previous administrative review." *Id.* at 10 (citing *NSK Ltd. v. United States,* 16 CIT 275, 277, 788 F. Supp. 1228, 1229 (1992), in turn citing *Beker Indus. Corp. v. United States,* 7 CIT 199, 585 F. Supp. 663 (1984)).[14]

C. Analysis

The Court agrees with Commerce that NTN failed to provide adequate evidence illustrating that all of NTN's United States selling expenses and home market selling expenses varied demonstrably with regard to LOT. In making its final determination, Commerce followed the standard set by this Court in *Timken Co.,* 20 CIT at 651–53, 930 F. Supp. at 627–29 that Commerce is to deny a LOT adjustment if Commerce finds that expenses did not vary according to LOT.

In the case at bar, NTN purports to show that it incurred different selling expenses at different trade levels by pointing to specific exhibits included in its proprietary memorandum. *See* NTN's Mem. at 25 (proprietary version). After a review of the record, Commerce concluded that the questionnaire responses that NTN provided for some of its United States packing and material expenses indicate that such expenses were incurred in connection with only one United States LOT. *See Issues & Decision Mem.* at 38. In the *Preliminary Results,* 64 Fed.

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[14] The Court disagrees with NTN's assertion that Commerce failed to articulate any legal argument that supports Commerce's methodology in the POR at issue, and refers NTN to Commerce's comments in the *Issues & Decision Mem.* and *Prelim. Analysis Mem., see infra* note 15, which adequately explain why Commerce reallocated all of NTN's selling expenses with exception to NTN's home market packing expenses. *See Issues & Decision Mem.* at 37–38.

Reg. 53,323,[15] Commerce accordingly "recalculated ratios for certain of NTN's [United States] packing and * * * labor expenses only for sales *to the one LOT* for which these expenses were incurred." *Issues & Decision Mem.* at 38 (emphasis added); *see Prelim. Analysis Mem.* at 7–8. Commerce further determined that although NTN's exhibits "clearly demonstrate that different methods of packing are required depending upon LOT," NTN provides no evidence that illustrates that all of NTN's selling expenses were incurred differently with regard to LOT. *Issues & Decision Mem.* at 38; *see Prelim. Analysis Mem.* at 7–8. Accordingly, in the *Final Results*, 65 Fed. Reg. 11,767, Commerce only accepted NTN's allocation of home market packing expenses according to LOT. *See Issues & Decision Mem.* at 38.

In *NTN 2002*, 26 CIT at ____, 186 F. Supp. 2d at 1268, this Court made clear that NTN has the burden before Commerce to establish its entitlement to a LOT adjustment. NTN's failure to provide the requisite evidence with regard to selling expenses, other than NTN's home market packing expenses, compels the Court to conclude that it has not met its burden of demonstrating that Commerce's denial of the LOT adjustment was not supported by substantial evidence and was not in accordance with law. *See NSK Ltd. v. United States*, 21 CIT 617, 635–36, 969 F. Supp. 34, 55 (1997), *aff'd, NSK Ltd. v. Koyo Seiko Co., Ltd.*, 190 F.3d 1321, 1330 (Fed. Cir. 1999). For the reasons stated above, the Court sustains Commerce's methodology.

VI. Commerce's Exclusion of Certain Home Market Sales to Affiliated Parties From the Normal Value Calculation

A. Background

During the POR, Commerce determined whether NTN's affiliated party sales should be used for purposes of calculating NV by employing its standard arm's-length test. *See* Def.'s Mem. at 47. Specifically, Commerce compared NTN's home market selling prices to NTN's affiliated and unaffiliated parties by using Commerce's 99.5% arm's-length test in which Commerce computes

> the weighted average price of all sales to each affiliated party by part number and the weighted average price of all sales of each part number to unaffiliated parties. * * * [F]or every part number sold to both unaffiliated and affiliated parties, the program calculates, for each related party, ratios of the affiliated and unaffiliated weighted average prices; these ratios are then weight-averaged to obtain the average of all part numbers sold to each related party. * * * [Commerce] only eliminates sales to a particular affiliated party from the calculation of NV when the average of all of these comparisons for that affiliate is less than 99.5 percent.

Issues & Decision Mem. at 39.

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[15] Commerce explained its preliminary methodology for the POR at issue in *Analysis Memorandum for Preliminary Results of the 1997–98 Review-NTN Corporation of Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof From Japan ("Prelim. Analysis Mem."). See* NTN's Mem. App. 5 (proprietary version).

B. Contentions of the Parties

NTN contends that Commerce erred in applying the arm's-length test because Commerce "compare[d] the weighted average price for unrelated sales [to the price] for individual related sales, and [failed to] consider other important factors such as quantity or payment terms of specific sales." NTN's Mem. at 28. NTN further argues that no statutory precedent establishes Commerce's ability to measure arms-length transactions by such a test. *See id.* To illustrate its contention, NTN provides a hypothetical example attempting to demonstrate that Commerce's arm's-length test is distortive. *See id.* at 28–29. Alternatively, NTN suggests that Commerce lower the threshold from 99.5 to 95 percent to ensure that the results "truly reflect the range of prices in [NTN's] transactions." *Id.* at 29. NTN further asserts that Commerce incorporate additional factors, such as quantity or payment terms of specific sales, in the application of its test. *See id.* at 29–30; NTN's Reply at 12.

In response, Commerce cites to 19 U.S.C. § 1677b(a)(5) (1994) highlighting the following:

> If the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party *may* be used in determining normal value.

Def.'s Mem. at 48 (emphasis in original). Relying on this statutory language, Commerce then argues that it has been granted broad discretion to devise and follow "its own methodology for determining when to use affiliated-party prices in determining NV as was [allotted for] under the prior law." *Id.* at 48–49 (citing 19 U.S.C. § 1677b(a)(3) (1988) and 19 C.F.R. § 353.45(a) (1996)).

Commerce also cites to several decisions that have upheld Commerce's test as reasonable, including *NTN Bearing Corp.*, 23 CIT at 486, 83 F. Supp. 2d at 1281, *NSK Ltd.*, 21 CIT at 635–36, 969 F. Supp. at 54, *NTN Bearing Corp.*, 19 CIT at 1240–41, 905 F. Supp. at 1099–1100, and *Usinor Sacilor v. United States*, 18 CIT 1155, 1157–58, 872 F. Supp. 1000, 1004 (1994). Timken supports Commerce's contentions. *See* Timken's Resp. at 19–20.

C. Analysis

The Court disagrees with NTN that Commerce's arm's-length test is unreasonable. Under the applicable statute, 19 U.S.C. § 1677b(a)(5), Commerce is granted considerable discretion in deciding whether to include affiliated party sales when calculating NV. *See Usinor*, 18 CIT at 1158, 872 F. Supp. at 1004. This Court has repeatedly upheld Commerce's arm's-length test on the basis that respondents' have failed to present "record evidence tending to show that * * * Commerce's test was unreasonable." *NTN Bearing Corp.*, 19 CIT at 1241, 905 F. Supp. at 1100; *see Torrington Co. v. United States*, 21 CIT 251, 261, 960 F. Supp. 339, 348 (1997) (stating that the respondent "must do more than indicate a possible correlation between price and quantity" to support its ar-

gument that Commerce should consider quantity in Commerce's arm's-length test); *NSK Ltd.*, 190 F.3d at 1328 (affirming the judgment of the CIT that Commerce's arm's-length methodology was reasonable given respondent's mere reference to a hypothetical and lack of record evidence that Commerce's methodology was unreasonable). Additionally, NTN's argument that Commerce reduce its arm's-length test threshold to 95% in order to yield a more accurate range of NTN's transaction prices fails to prove that Commerce's current test is in fact unreasonable.

This Court has also repeatedly rejected NTN's argument that Commerce consider additional factors, such as quantity and payment terms of specific sales in its determination of whether sales prices to affiliated and unaffiliated parties are comparable. NTN has failed to point to sufficient record evidence that would persuade the Court to depart from its prior holdings in *NTN 2002*, 26 CIT at ____, 186 F. Supp. 2d at 1287–88, *NTN Bearing Corp. v. United States*, 24 CIT at ____, 104 F. Supp. 2d at 148, and *NTN Bearing Corp.*, 19 CIT at 1241, 905 F. Supp. at 1099 (disagreeing "with NTN that Commerce's arm[']s-length test is flawed because Commerce did not take into account certain factors proposed by NTN"). Accordingly, the Court upholds Commerce's application of the arm's-length test to exclude certain home market sales to affiliated parties from the NV calculation as reasonable, in accordance with law and supported by substantial evidence.

VII. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade

A. Background

The pertinent section of the United States Code states that NV be based on "the price at which the foreign like product is first sold * * * in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Section 1677b(e)(2)(A) provides that CV be calculated in part, by using "amounts incurred and realized by the * * * producer [under] review * * * in connection with the production and sale of a foreign like product in the ordinary course of trade, for consumption in the foreign country. * * *" 19 U.S.C. § 1677b(e)(2)(A) (1994). The term "ordinary course of trade" is defined by 19 U.S.C. § 1677(15) as

> the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. [Commerce] shall consider [sales disregarded under § 1677b(b)(1) and transactions disregarded under § 1677b(f)(2)], *among others*, to be outside the ordinary course of trade * * *.

19 U.S.C. § 1677(15) (1994) (emphasis added). Sections 1677b(b)(1) and 1677b(f)(2) respectively deal with below-cost sales and affiliated parties and were not involved in the determination at issue. Although § 1677b(b)(1)'s sales below COP and § 1677b(f)(2)'s affiliated party transactions are specifically designated as outside the ordinary course

of trade, the "among others" language of § 1677(15) clearly indicates that other types of sales could be excluded as being outside the ordinary course of trade.

In particular, the SAA states that aside from 19 U.S.C. §§ 1677b(b)(1) and f(2):

> Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications *[or] merchandise sold at aberrational prices.*
>
> * * * * * * *
>
> [Section 1677(15)] does not establish an exhaustive list, but [Commerce is given discretion to] interpret section 1677(15) in a manner which will avoid basing [NV] on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

SAA at 834 (emphasis added). The court in *Koenig & Bauer-Albert AG v. United States ("Koenig")*, 22 CIT 574, 589, 15 F. Supp. 2d 834, 850 (1998), *vacated on other grounds, Koenig & Bauer-Albert AG v. United States*, 259 F.3d 1341 (Fed. Cir. 2001), articulated that "Commerce has the discretion to decide under what circumstances highly profitable sales would be considered to be outside the ordinary course of trade," but also recognized that Commerce can not "impose this requirement arbitrarily."

B. Contentions of the Parties

NTN claims that Commerce improperly included certain NTN sales that were allegedly outside the ordinary course of trade in Commerce's dumping margin and CV profit calculations. *See* NTN's Mem. at 30–33. In NTN's attempt to show that Commerce erred in including certain sales in its calculations, NTN provided Commerce with what it claims to be specific record evidence indicating that NTN's high profit sales were in fact outside the ordinary course of trade. *See id.* at 31–32; *see also* NTN's Mem. Apps. 7 & 8. *But see Issues & Decision Mem.* at 44.

Commerce, in turn, argues that the evidence provided by NTN fails to demonstrate that such sales were, in fact, outside the ordinary course of trade. *See* Def.'s Mem. at 57. Accordingly, Commerce contends that it properly included such sales in its calculations and that its decision is supported by record evidence and in tune with its statutory requirements. *See id.* at 55–61. Timken adds that NTN "bears the burden of proving that home market sales are not in the ordinary course of trade * * * [and that] NTN has failed to make such a demonstration regarding either its 'sample' sales or its alleged 'high profit' sales." Timken's Resp. at 20–21.

C. Analysis

1. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade In Commerce's Margin Calculation

The issue before the Court is whether Commerce reasonably included certain sample sales and sales with high profit levels in NTN's home market sales database in its dumping margin, instead of determining that such sales were outside the ordinary course of trade, and accordingly excluding them. In the *Issues & Decision Mem.*, Commerce laid out its practice concerning the exclusion of certain sales from the margin calculation when such sales, in fact, fall outside the ordinary course of trade. Commerce states that it has

> examined the record with respect to NTN's alleged home market sample sales to determine if these sales qualify for such an exclusion. In its original questionnaire response, NTN only states that "samples are provided to customers for the purpose of allowing the customer to determine whether a particular product is suited to the customer's needs" and that "the purpose * * * would not be the same as those purchased in the normal course of trade. * * *" In its * * * supplemental response, NTN did not provide additional information to demonstrate clearly that its alleged sample sales are outside the ordinary course of trade. *The mere fact that a respondent identified sales as samples does not necessarily render such sales outside the ordinary course of trade[.]* * * * For these reasons, [Commerce] disagree[s] with NTN that its home market sample sales should be excluded from [the] margin calculations. * * *

Issues & Decision Mem. at 44 (emphasis added).

Commerce also stated that NTN failed to provide any further evidence illustrating that any of NTN's "high profit" sales were actually outside the ordinary course of trade. *See id.* According to Commerce, just because NTN has instances of high profits is not dispositive of the fact that the sales relating to such were actually outside the ordinary course of trade. *See id.* In its questionnaire to NTN, Commerce stated that

> the *burden of proof is on [NTN]* to demonstrate, through narrative explanation of the circumstances surrounding such sales *and supporting documentation or other evidence,* that sales claimed to be outside the ordinary course of trade are in fact outside the ordinary course of trade. [Commerce] will not consider only one factor in isolation *(i.e.,* the fact that certain sales are labeled as samples, or that a transaction involved small quantities or high prices) as sufficient proof that a sale is not in the ordinary course of trade.

Def.'s Mem. Ex. 2 (proprietary version); Def.'s Mem. at 57–58; *see also Nachi-Fujikoshi Corp. v. United States,* 16 CIT 606, 608, 798 F. Supp 716, 718 (1992). Nevertheless, NTN argues that it has provided Commerce with sufficient record evidence and points to a number of exhibits

in its memorandum referring to zero-priced sample data[16] and explanations of NTN's instances of high profit sales. *See* NTN's Mem. at 31. NTN also cites *CEMEX, S.A. v. United States,* 133 F.3d 897 (Fed. Cir. 1998) in support of its argument that Commerce should exclude sales with abnormally high profit levels. *See id.* at 32.

The Court disagrees with NTN that Commerce should exclude such sales from its margin calculation. Although the CAFC sustained Commerce's determination that certain home market sales were outside the ordinary course of trade, *CEMEX,* 133 F.3d at 901, the court noted that for that review, Commerce had examined factors additional to profit. In the case at bar, NTN supports its contentions with evidence regarding only one factor, namely profit. *See* NTN's Mem. at 31 (listing NTN's exhibits referring to profit). According to the court in *CEMEX,* 133 F.3d at 900, Commerce must evaluate not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question." Furthermore, this Court previously held that a lack of showing that the transactions at issue possessed some unique and unusual characteristic that make them unrepresentative of the home market allot Commerce the discretion to include such transactions in NTN's home market database. *See NSK 2002,* 26 CIT at ____, 217 F. Supp. 2d at 1315 (analogizing *NTN Bearing Corp.,* 19 CIT at 1229, 905 F. Supp. at 1091).

In both its *Issues & Decision Mem.* and Def.'s Mem., Commerce makes clear that NTN failed to meet its burden of proof regarding evidence of NTN's sample sales and sales with high profit that NTN claims were outside the ordinary course of trade. Therefore, this Court sustains Commerce's decision to include such sales in its margin calculation.

2. Commerce's Inclusion of Certain NTN Sales Allegedly Outside the Ordinary Course of Trade In Commerce's CV Profit Calculation

NTN raises the related argument that since NTN's sample sales and sales with abnormally high profits are outside the ordinary course of trade, they should also be excluded from Commerce's CV calculation. *See* NTN's Mem. at 32–33. In response, Commerce states that

> NTN provided no evidence which demonstrated that the profit amounts realized on the sales [] claimed to be outside the ordinary course of trade are particularly, much less abnormally, high. NTN has selected an arbitrary profit margin which it defines as "high," but it provides no evidence or analysis which suggests that the profit margin it chose is in any way unusual. To the contrary, there are enough of these claimed "high profit" sales in NTN's home[]market database that it is apparent that these sales are not unusual but, rather, occur typically within NTN's normal course of trade.

Issues & Decision Mem. at 44.

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[16] Commerce has excluded NTN's home market zero-price sample sales from its determination, and therefore the Court refuses to consider any argument or evidence pertaining to such. *See Issues & Decision Mem.* at 44 n.9l. *See generally* NTN's Mem. at 31.

As acknowledged in *Koenig*, 22 CIT at 589, 15 F. Supp. 2d at 850, Commerce is granted discretion to consider under what circumstances high profit sales are actually outside the ordinary course of trade. *See Mitsubishi Heavy Indus. v. United States*, 22 CIT 541, 568, 15 F. Supp. 2d 807, 830 (1998); *see also Notice of Final Determination of Sales Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled From Germany*, 61 Fed. Reg. 38,166, 38,178 (July 23, 1996); *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (July 23, 1996). In the review at issue, Commerce refused to exclude certain NTN sample and high profit sales from its CV calculation because NTN failed to show that such sales were outside the ordinary course of trade due to "unique and unusual characteristics related to the sale[s] in question which make [them] unrepresentative of the home market." *Issues & Decision Mem.* at 44. Commerce acknowledged that such sales should be excluded only if circumstances existed that would lead Commerce to the conclusion that such sales, were in fact, made outside the ordinary course of trade. *See id.* A lack of evidence provided by NTN that would enable Commere to reach such a conclusion makes it reasonable for Commerce to include such sales in the CV profit calculation. *See NTN Bearing Corp.*, 19 CIT at 1229, 905 F. Supp. at 1091. Accordingly, this Court upholds Commerce's decision to include such sales in its CV profit calculation.

VIII. Commerce's Strict Reliance Upon the Sum-of-Deviations Methodology for its Model Match Analysis

A. Background

During this review, Commerce relied upon the "sum-of-deviations" ("SUMDEV") methodology to determine NTN's similar home market models of the merchandise under review as potential matches to the United States models. *See* Def.'s Mem. at 61–62; NTN's Mem. at 33–34; NTN's Reply at 15. The SUMDEV methodology uses five physical criteria, namely, inside diameter, outside diameter, width, load rating and Y2 factor, along with a twenty percent difmer test when determining which TRB models are most similar to the United States model. *See Issues & Decision Mem.* at 46; Def.'s Mem. at 61–62 & n.19; *see also Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1207 (Fed. Cir. 1995) (explaining the different criteria).

When determining appropriate product comparisons for United States sales, Commerce first tries to match United States TRB models to identical models sold in NTN's home market. *See Issues & Decision Mem.* at 46. When an identical model was not available, Commerce applied the SUMDEV methodology. *See id.*

Section 1677(16) of Title 19 of the United States Code defines the term "foreign like product" as

> merchandise in the first of the following categories in respect of which a determination * * * can be satisfactorily made:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
> (ii) like that merchandise in the purposes for which used, and
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1994). The CAFC stated in *Koyo Seiko Co.*, 66 F.3d at 1209, that "Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]. This Congressional delegation of authority empowers Commerce to choose the manner in which 'such or similar' merchandise shall be selected. *Chevron* applies * * *."

B. Contentions of the Parties

NTN argues that Commerce's practice of exclusively "ranking" similar merchandise on the basis of the SUMDEV methodology does not allow Commerce to determine the most similar matches because the test fails to account for the cost deviation among the TRB models themselves. *See Issues & Decision Mem.* at 45; NTN's Mem. at 34. Specifically, NTN contends that "[t]he exclusive use of the [SUMDEV] methodology to rank similar models creates the possibility that [United States] sales will be matched to sales with a relatively low [SUMDEV] total, but a very high difmer total, while another sale may have a very similar, but higher, [SUMDEV] total, but a much lower difmer total." NTN's Mem. at 34; *see also Issues & Decision Mem.* at 45. NTN uses a hypothetical example to attempt to show that Commerce's SUMDEV methodology is *prima facie* distortive. *See* NTN's Mem. at 34–35. NTN concludes by citing to *Böwe-Passat,* 17 CIT at 340, as support of its contention that Commerce should be ordered to modify the SUMDEV methodology "to account for cost deviation among models [in order for Commerce] to fulfill [its] statutory mandate * * *." NTN's Mem. at 34. NTN suggests that Commerce be ordered to alter its methodology by using the "cost variances not only to determine commercial comparability for purposes of [19 U.S.C. § 1677(16)(B),] but also to select most similar home market TRB models." *Issues & Decision Mem.* at 47.

Commerce asserts that 19 U.S.C. § 1677(16) provides general guidance in selecting the products sold in the foreign market to be compared to United States merchandise. *See Issues & Decision Mem.* at 46. The statute first directs Commerce to find home market merchandise with identical qualities to those sold in the United States and, if unavailable, to search for merchandise that would satisfy §§ 1677(16)(B) and (C). *See id.* at 47. To satisfy such statutory requirements, Commerce eliminates, as possible matches, those models for which the variable cost of manufacturing differences exceed 20 percent of the total cost of manufacturing of the United States model. *See id.* Therefore, Commerce contends that Commerce's SUMDEV methodology is both a reasonable application of its discretion to determine what constitutes similar merchandise for the purpose of calculating NV, and is supported by the law. *See id.*

C. Analysis

In *Koyo Seiko Co.*, 66 F.3d at 1209, the CAFC held that "Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]. This Congressional delegation of authority empowers Commerce to choose the manner in which 'such or similar' merchandise shall be selected. *Chevron* applies in such a situation." (Citations omitted).

In the case at bar, Commerce explained that

> the selection of similar merchandise is based on a product's physical characteristics and not differences in cost. Furthermore, [Commerce's] matching methodology satisfies NTN's apparent concerns that dissimilar merchandise may be compared because it precludes the pairing of models whose cost deviation exceeds 20 percent and provides for a difmer adjustment to NV if non-identical TRB models are matched. * * *
>
> Regarding NTN's suggestion that [Commerce] place a cap on the [SUMDEV] model-match methodology, [Commerce explains] that the [CAFC] has considered [Commerce's] [SUMDEV] methodology to be reasonable * * *.

Issues & Decision Mem. at 47.

The Court agrees that Commerce is not required to adopt the particular matching methodology advanced by NTN, *see Koyo Seiko Co.*, 66 F.3d at 1209; *Timken Co. v. United States*, 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986); *NTN Bearing Corp. of Am. v. United States*, 18 CIT 555, 559 (1994), and finds that Commerce's decision to apply its SUMDEV methodology is reasonable and in accordance with law. *See Peer Bearing Co. v. United Sates*, 25 CIT ____, ____, 182 F. Supp. 2d 1285, 1305 (2001) (pointing out that "[i]n the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken Co. v. United States*, 23 CIT 509, 516, 59 F. Supp. 2d 1371, 1377 (1999)); *see also Chevron*, 467 U.S. at 844–45.

The Court also agrees with Commerce that NTN has failed to demonstrate that Commerce's use of its SUMDEV methodology is, in any way, distortive. NTN merely supplies the Court with a hypothetical example suggesting that Commerce's "exclusive use of the [SUMDEV] methodology to rank similar models creates the possibility that [United States] sales will be matched to sales with a relatively low [SUMDEV] total, but a very high difmer total, while another sale may have a very similar, but higher, [SUMDEV] total, but a much lower difmer total." NTN's Mem. at 34. Such a suggestion is not sufficient evidence to prove that Commerce's methodology is in any way distortive or an unreasonable interpretation of Commerce's discretion to "determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under [19 U.S.C. § 1677(16)]." *Koyo Seiko Co.*, 66 F.3d at 1209.

IX. Commerce's Treatment of Indirect Selling Expenses for Interest Alleged to Have Been Incurred by NTN in Financing Cash Deposits for Antidumping Duties

A. Background

During the review at issue, Commerce added an amount that it classified as interest on cash deposits to NTN's United States indirect selling expenses calculation. *See* NTN's Mem. App. 5 at 17 (proprietary version). Commerce states that

> [w]ith respect to the proper handling of the amount for interest on cash deposits, * * * NTN has [previously] indicated that the amount in question represents interest payments on the financing of cash deposits for antidumping duties. Thus, for these *[Final Results*, 65 Fed. Reg. 11,767, Commerce] ha[s] made no changes to the manner in which [it] recalculated NTN's [United States indirect selling expenses]."

Issues & Decision Mem. at 50.

B. Contentions of the Parties

NTN contends that Commerce improperly added a certain amount to Commerce's calculations of NTN's selling expenses that was allegedly incurred in financing cash deposits for antidumping duties. *See* NTN's Mem. at 34–35. NTN claims that since that amount did not equal the figure reported to Commerce by NTN, *compare* NTN's Mem. App 7 at 1 (illustrating worksheet 3 of NTN's questionnaire response to Commerce) (proprietary version) *with id.* App. 5 at 17 (illustrating attachment II of Commerce's calculation of NTN's United States selling expenses) (proprietary version), Commerce should remove the added amount from its calculation since it "effectively penalizes NTN in this amount. * * *" NTN's Mem. at 35. NTN adds that this particular adjustment is unlike those in previous reviews and, therefore, considers Commerce's response to NTN's contentions unresponsive. *See* NTN's Reply at 16. Commerce responds that its decision is reasonable and in accordance with law. "While antidumping duties and cash deposits have never been considered expenses deductible from [United States] price,"

Commerce asserts that "interest expenses incurred in connection with selling activities in the [United States] are deductible from [the United States] price." Def.'s Mem. at 67. Accordingly, Commerce allowed an adjustment to indirect selling expenses with regard to those expenses that Commerce determined to be non-selling expenses. *See id.* Timken supports Commerce's contentions and charges NTN with improperly calculating its expense figures. *See* Timken Resp. at 22 (proprietary version).

C. Analysis

Section 1677a(d)(1) of Title 19 provides for a CEP adjustment of certain expenses incurred by affiliated sellers in selling the subject merchandise in the United States. The statute, however, does not precisely identify what such expenses are. *See generally* 19 U.S.C. § 1677a(d)(1) (1994); *Koyo Seiko Co. v. United States*, 26 CIT ____, ____, 186 F. Supp. 2d 1332, 1349–50 (2002) (highlighting previous reviews that Commerce has dealt with such expenses).

For some period of time, Commerce's practice was to deem financing interest of cash deposits as a selling expense and, therefore, Commerce allowed respondents that incurred such expenses to deduct the interest from indirect selling expenses prior to the deduction of such indirect selling expenses from the CEP. *See Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 62 Fed. Reg. 2081, 2104–05 (Jan. 15, 1997). However, at a later point, Commerce reexamined this practice and the policies underlying it. Specifically, Commerce observed that

> [t]he statute does not contain a precise definition of what constitutes a selling expense. Instead, Congress gave [Commerce] discretion in this area. It is a matter of policy whether [Commerce] consider[s] there to be any financing expenses associated with cash deposits. [Commerce] recognize[s] that [Commerce] ha[s], to a limited extent, removed such expenses from indirect selling expenses for such financing expenses in past reviews * * *. However, [Commerce] ha[s] reconsidered [Commerce's] position on this matter and ha[s] now concluded that this practice is inappropriate.

Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 62 Fed. Reg. 54,043, 54,079 (Oct. 17, 1997).

This Court has held that Commerce has the discretion to alter its policy, so long as Commerce presents a reasonable rationale for its departure from the previous practice, *see NSK 2002*, 26 CIT at ___, 217 F. Supp. 2d at 1307–09 (relying on *Chevron*, 467 U.S. at 843, *Timken Co. v. United States*, 22 CIT 621, 628, 16 F. Supp. 2d 1102, 1106 (1998)), and accordingly has upheld Commerce's decision to deny an adjustment to NTN's United States indirect selling expenses for interest allegedly in-

curred by NTN in financing cash deposits for antidumping duties. *See NSK 2002,* 26 CIT at ____, 217 F. Supp. 2d at 1309.

In the case at bar, NTN claims that, unlike Commerce's practice in past reviews, Commerce added an amount for interest incurred financing cash deposits to its selling expense calculation that did not coincide with the figure provided by NTN to Commerce in its questionnaire response. *See* NTN's Reply at 16. The crux of NTN's complaint is that Commerce failed to address this issue in its response and that Timken misunderstood the data provided by NTN. *See id.* at 16–17. The Court, however, does not find these arguments persuasive. Commerce states that

> *NTN has indicated [in its case brief] that the amount in question represents interest payments on the financing of cash deposits for antidumping duties.* Thus, for these *[Final Results,* 65 Fed. Reg. 11,767, Commerce] ha[s] made no changes to the manner in which [Commerce] recalculated NTN [United States indirect selling expenses].

Issues & Decision Mem. at 50 (emphasis added). Accordingly, the Court will adhere to its reasoning in *NSK 2002,* 26 CIT at ____, 217 F. Supp. 2d at 1309, and sustain Commerce's decision to deny an adjustment to NTN's United States indirect selling expenses for interest allegedly incurred by NTN in financing cash deposits for antidumping duties.

X. Commerce's Application of Adverse Facts Available to Koyo's Sales of Further-Manufactured Merchandise and Entered Values (Koyo and Timken)

A. Statutory Background

An antidumping duty is imposed upon imported merchandise when: (1) Commerce determines such merchandise is being dumped, that is, sold or likely to be sold in the United States at less than fair value; and (2) the International Trade Commission determines that an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. §§ 1673, 1677(34) (1994). To determine whether there is dumping, Commerce compares the price of the imported merchandise in the United States to the NV for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b (1994). The price in the United States is calculated using either an EP or CEP. *See* 19 U.S.C. §§ 1677a(a), (b); *see also,* SAA at 822 (1994) (Commerce will classify the price of a United States sales transaction as a CEP "[i]f, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter"); *Koenig & Bauer-Albert AG v. United States,* 22 CIT at 589–593, 15 F. Supp. 2d at 850–852 (discussing when to apply EP or CEP methodology).

Commerce must reduce the price used to establish CEP by any of the following amounts associated with economic activities occurring in the United States: (1) commissions paid in "selling the subject merchandise in the United States"; (2) direct selling expenses, that is, "expenses that

result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties"; (3) "any selling expenses that the seller pays on behalf of the purchaser" (assumptions); (4) indirect selling expenses, that is, any selling expenses not deducted under any of the first three categories of deductions; (5) certain expenses resulting from further manufacture or assembly (including additional material and labor) performed on the merchandise after its importation into the United States; and (6) profit allocated to the expenses described in categories (1) through (5). 19 U.S.C. § 1677a(d)(1)–(3); *see* SAA at 823–24.

Commerce calculates the expenses resulting from further manufacture or assembly using one of two statutory methods. *See* 19 U.S.C. §§ 1677a(d), (e). The first method provides that Commerce shall reduce "the price used to establish [CEP by] * * * the cost of any further manufacture or assembly (including additional material and labor), except in [certain] circumstances." 19 U.S.C. § 1677a(d)(2). When the first method does not apply, Commerce applies a special rule for merchandise with value added after importation ("Special Rule"). *See* 19 U.S.C. § 1677a(e) (1994).

The Special Rule provides that:

> [w]here the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, [Commerce] shall determine the [CEP] for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison and [Commerce] determines that the use of such sales is appropriate:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or [Commerce] determines that neither of the prices described in such paragraphs is appropriate, then the [CEP] may be determined on any other reasonable basis.

19 U.S.C. § 1677a(e).

B. Factual Background

On February 18, 1999, Koyo requested that Commerce apply the Special Rule pursuant to 19 U.S.C. § 1677a(e) for certain of Koyo's imported bearings and bearing parts further manufactured in the United States prior to being sold to an unaffiliated customer. *See* Koyo's Mem. Ex. A. Moreover, Koyo requested that Commerce exempt it from completing Section E of Commerce's questionnaire that required Koyo to report sales and cost data information for its further manufactured sales. *See id.* Ex. A at 2. Commerce notified Koyo on March 11, 1999, that based on certain information provided by Koyo, Commerce determined that Koyo

is required to provide additional information regarding its sales of further manufactured bearings, and mandated that Koyo respond to Section E of Commerce's questionnaire. *See id.* Ex. B. Koyo declined to provide this additional information. *See id.* Ex. F. Commerce explained that

> the record does not lead [Commerce] to conclude that the use of either of the two alternative methods described in [1677a(e)(1) and (2)] with respect to Koyo's further-manufactured [subject] merchandise is appropriate. As noted in [the *Preliminary Results,* 64 Fed. Reg. 53,323,] the finished merchandise sold by Koyo to the first unrelated [United States] customer was still in the same class or kind as merchandise within the scope of the TRB order and finding *(i.e.,* imported TRB components were processed into TRBs). As a result, the calculation of the precise amount of value added for Koyo's further-manufactured sales would not be nearly as burdensome as it would be for * * * []other respondent[s] who imported TRBs for incorporation in automobiles and transmission assemblies. Furthermore, in prior reviews [Commerce] ha[s] calculated margins for Koyo's further-processed sales and has extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales. In addition, the record clearly indicates that Koyo's further-manufactured [United States] sales represented a large portion of its total [United States] sales during the POR. Furthermore, A–588–604 margins [Commerce] ha[s] calculated for Koyo for determinations in past reviews in which further-manufactured sales were included in [Commerce's] databases have been significantly higher than margins [Commerce] ha[s] calculated in past reviews of Koyo in the A–588–604 case in which there were no further-manufactured sales in [Commerce's] analysis. This indicates that, in this particular case, the margins on further-manufactured sales are not necessarily equivalent to the margins on non-further-manufactured sales. Thus, the standard methodology would likely yield more accurate results in this case. Consideration of this difference in past Koyo margins in which further-manufactured sales were included in [Commerce's] analysis cannot be overlooked in [Commerce's] evaluation of the additional accuracy [Commerce] would likely gain by using the standard methodology in this case. Therefore, for all of the above reasons, in this case [Commerce] ha[s] determined that the relatively small reduction of burden on [Commerce] that would result from resorting to either of the two proxy methods under the [S]pecial [R]ule would be outweighed by the potential distortion and losses in accuracy as a consequence of their use. Accordingly, for this case [Commerce] ha[s] rejected the use of either of the two proxies as inappropriate and ha[s] sought to calculate the CEP for Koyo's further manufactured sales using another reasonable basis.

Issues & Decision Mem. at 12.

As another reasonable method, Commerce chose its standard methodology under 19 U.S.C. § 1677a(d)(2) to calculate the CEP of Koyo's further-manufactured merchandise and found that this methodology

was not burdensome and "presented a higher probability of accurate results than using margins calculated for non-further manufactured sales." Def.'s Mem. at 78 (citing *Issues & Decision Mem.* at 13–14). Koyo objected to the use of Comerce's standard methodology for calculating the CEP of its further-manufactured TRB merchandise and suggests that

> instead of evaluating whether the margins for finished over-4-inch A–588–604 bearings were an appropriate surrogate for A–588–604 further-manufactured merchandise, [Commerce] could have used the margins it calculated for finished A–588–054 bearings as a proxy for that A–588–604 merchandise which was further processed into under-4-inch bearings, and the margins calculated for the finished A–588–604 bearings as a proxy for that A–588–604 merchandise which was further processed into over-4-inch bearings.

Issues & Decision Mem. at 13.

Commerce responded that

> [w]hile Koyo's proposal would be less burdensome than the use of the standard methodology, the record clearly indicates that the use of the standard methodology for Koyo would yield more accurate results: [Commerce] believe[s] that the gains in accuracy [Commerce] would achieve would outweigh any burden resulting from the use of the standard calculation. Koyo suggests an alternative method for grouping its non-further-manufactured sales such that the division of merchandise subject to the TRB order and finding would be breached. Not only has [Commerce] never before breached the division between orders in any aspect of [Commerce's] analysis or calculations, but Koyo has provided no evidence that its alternative would yield results more accurate than [Commerce's] standard methodology. The record contains no compelling reasons for [Commerce] to abandon [Commerce's] long-standing policy of treating orders as separate proceedings. Rather, the record supports [Commerce's] continued use of the standard methodology as a reasonable basis for calculating the CEP for Koyo's further-manufactured merchandise.

Id. at 13–14. Since Koyo failed to comply with Commerce's request that Koyo complete Section E of Commerce's questionnaire, Commerce applied, as adverse facts available, "the highest rate ever calculated for Koyo in any previous review of the TRBs at issue[, * * * and applied this] rate * * * to the total entered value of Koyo's further-manufactured sales" to calculate the CEP of Koyo's further-manufactured merchandise. Def.'s Mem. at 82–83.

C. Contentions of the Parties

1. Koyo's Contentions

Koyo contends that it submitted certain information to Commerce illustrating that the "value added in the United States to imported TRB parts exceeded substantially the value of those parts, and that [such information] satisfied the prerequisites for the application of the statuto-

ry 'special rule,' 19 U.S.C. § 1677a(e). * * *" Koyo's Mem. at 14. Accordingly, Commerce should have calculated Koyo's CEP of further processed merchandise sales by implementing a methodology other than what Commerce uses in its standard analysis. *See id.* at 15, 19. Koyo asserts that "Congress' use of the word 'shall' in the first paragraph of section 1677a(e)[17] demonstrates that [Commerce] is not given discretion [regarding its] use [of] the 'special rule,' but is directed to do so whenever [Commerce] finds that the value added in the United States is likely to exceed substantially the value of the imported components." *Id.* at 19. Koyo also argues that Commerce's mandate that Koyo submit a full Section E response to Commerce's questionnaire "ignored the clear language" of 19 U.S.C. § 1677a(e) directing Commerce to calculate CEP of further processed merchandise sales on a "more reasonable" and "less burdensome" manner. *See id.* 19–20.

According to Koyo, the case at bar concerns the issue of whether Commerce acted reasonably and within its statutory limits by applying the Special Rule, as provided for in 19 U.S.C. § 1677a(e), in addition to relying on its standard further-manufacturing methodology, provided for in 19 U.S.C. § 1677a(d)(2) (1994), and requesting from Koyo a Section E response. *See id.* at 20–22. Koyo asserts that 19 U.S.C. §§ 1677a(d) and 1677a(e) are mutually exclusive and, as such, Commerce may not employ its standard analysis as an "other reasonable basis" under § 1677a(e). *See id.* at 22. In other words, when the Special Rule applies, Commerce "is foreclosed from deducting the cost of further manufacture[d TRBs] * * * and must rely on an alternative basis to calculate the margins on further processed merchandise." Koyo's Resp. at 15. Koyo further argues that the facts in the record fail to support Commerce's justifications for applying the standard analysis under the Special Rule, but rather that Commerce's conclusion is based on a "false premise * * * that the differences between the margins of further processed and non-further processed merchandise in past reviews are indicative of the results in the current review." Koyo's Mem. at 23. Although Koyo recognizes that Commerce may use knowledge it has developed from prior reviews regarding some aspects of Koyo's participation in the anti-dumping process, there has been no administrative review for Koyo in which the record reflects data on Koyo's further processed TRBs since 1993/94. *Id.* at 23.

Koyo proposed to Commerce an alternative methodology on which to calculate the dumping margins in this POR, which Koyo claims Commerce "erroneously rejected." *See id.* at 24–27. Koyo also raises issue with Commerce's "confusion" regarding the formula Commerce is to apply in determining the relative accuracy of the standard methodology.

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[17] The pertinent section reads that Commerce

> * * * *shall* determine the constructed export price for [subject merchandise that is imported by an affiliated exporter and the value added in the United States is likely to substantially exceed the subject merchandise's value] by using one of the following prices[:] * * *
>
> (1) [t]he price of identical subject merchandise sold by the exporter * * * to an unaffiliated person[; or]
>
> (2) [t]he price of other subject merchandise sold by the exporter * * * to an unaffiliated person.

19 U.S.C. § 1677a(e).

Koyo cites to various pages of the *Issues & Decision Mem.* claiming that Commerce fails to consistently apply the appropriate test measuring the relative "accuracy" of Commerce's standard methodology versus the implementation of an alternative methodology. *See id.* at 27–28.

2. Commerce's Contentions

Commerce contends that Congress has granted to Commerce broad discretion in determining when the use of "any other reasonable basis" under 19 U.S.C. § 1677a(e) is appropriate. Def.'s Mem. at 79–82. Commerce maintains that "[n]either the statute nor the SAA prohibits Commerce from using the more burdensome standard [19 U.S.C. § 1677a](d)(2) methodology as an alternative reasonable method where the agency finds that neither alternative under [§§ 1677a](e)(1) or (e)(2) is appropriate." *Id.* at 81. In this case, Commerce determined that

> the record does not lead [Commerce] to conclude that the use of either of the two alternative methods described in [§§ 1677a(e)(1) and (2)] with respect to Koyo's further-manufactured merchandise is appropriate. As noted in [Commerce's *Preliminary Results,* 64 Fed. Reg. 53,323,] the finished merchandise sold by Koyo to the first unrelated [United States] customer was still in the same class or kind as merchandise within the scope of the TRB order and finding *(i.e.*, imported TRB components were processed into TRBs). As a result, the calculation of the precise amount of value added for Koyo's further-manufactured sales would not be nearly as burdensome as it would be for * * * another respondent who imported TRBs for incorporation in automobiles and transmission assemblies. Furthermore, in prior reviews Commerce ha[s] calculated margins for Koyo's further-processed sales and ha[s] extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales. In addition, the record clearly indicates that Koyo's further-manufactured [United States] sales represented a large portion of its total [United States] sales during the POR. Furthermore, A–588–604 margins [Commerce] ha[s] calculated for Koyo for determinations in past reviews in which further-manufactured sales were included in [Commerce's] databases have been significantly higher than margins [Commerce] ha[s] calculated in past reviews of Koyo in the A–588–604 case in which there were no further-manufactured sales in our analysis. This indicates that, in this particular case, the margins on further-manufactured sales are not necessarily equivalent to the margins on non-further-manufactured sales. Thus, the standard methodology would likely yield more accurate results in this case. Consideration of this difference in past Koyo margins in which further-manufactured sales were included in [Commerce's] analysis cannot be overlooked in [Commerce's] evaluation of the additional accuracy [Commerce] would likely gain by using the standard methodology in this case. Therefore, for all of the above reasons, in this case [Commerce] ha[s] determined that the relatively small reduction of burden on [Commerce] that would result from resorting to either of the two proxy methods under the special rule would be outweighed by the

> potential distortion and losses in accuracy as a consequence of their use. Accordingly, for this case [Commerce has] rejected the use of either of the two proxies as inappropriate and ha[s] sought to calculate the CEP for Koyo's further manufactured sales using another reasonable basis.

Issues & Decision Mem. at 12.

Although Commerce agrees that Koyo's proposed methodology would be less burdensome than Commerce's standard methodology under § 1677a(d)(2), Commerce contends that "* * * the record clearly indicates that the use of the standard methodology for Koyo would yield more accurate results. * * *" *Issues & Decision Mem.* at 13–14; Def.'s Mem. at 80. Commerce cites the CAFC's decision in *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990), recognizing that the purpose behind the antidumping statute is to ensure that Commerce calculates the dumping margins as accurately as possible. *See* Def.'s Mem. at 80–81. Although Commerce does not dispute that the underlying purposes of the Special Rule is to ensure that Commerce avoid certain complexities involved in implementing the standard methodology set forth in 19 U.S.C. § 1677a(d)(2), Commerce has determined that in the case at bar, achieving accuracy is to outweigh the goal of reducing the burden associated with implementing the standard analysis. *See id.* at 82. According to Commerce, it acted within its statutory authority and the Court can not "weigh the wisdom of Commerce's legitimate policy choices." *Id.*

Commerce also contends that it acted in accordance with 19 U.S.C. § 1677e when it used the adverse facts available margin rate to calculate the CEP of Koyo's further-manufactured merchandise. *See id.* In particular, Commerce argues that, since Koyo failed to act to the best of its ability by refusing to respond to the particular section of Commerce's questionnaire, Commerce properly selected the adverse facts available margin rate and applied it to the total entered value of Koyo's further-manufactured merchandise. *See id.* 82–83. Contrary to Timken's argument that Commerce should have applied facts available to Koyo's total sales value of the further-manufactured sales rather than to the entered value of Koyo's sales, Commerce maintains that it "is not required by the statute to select a method that is 'the most' or 'more' reasonably adverse." *Id.* at 83. In sum, Commerce argues that it has adhered to the statutory language in "choosing the highest margin ever calculated for Koyo in the reviews * * * at issues." *Id.* Commerce contends that it had the discretion to choose the sources and facts upon which Commerce will depend upon to support an adverse interest "when a respondent has been determined to be uncooperative." *Id.* at 84.

According to Commerce, "[t]he adverse facts available rate selected * * * in this case represents an increase over past practice; yet, the application of that rate to entered value is consistent with past practice [as well]." *Id.* at 86; *see also id.* at 87. Commerce maintains that its application of the adverse facts available rate to the entered value rather than

Koyo's sales values of further-manufactured TRBs is consistent with Commerce's practice in determining assessment rates. *See id.* at 87 (explaining Commerce's calculation of assessment rates under 19 C.F.R. § 351.212(b)). Finally, Commerce argues that adherence to Timken's suggestion that Commerce apply an adverse facts available rate to the total sales value would result in punitive results for Koyo. *See id.*

3. Timken's Contentions

Timken agrees with Commerce's resort to its standard methodology under 19 U.S.C. § 1677a(d)(2) as an alternative reasonable method and argues that Commerce has broad discretion as when to use "any other reasonable basis" under § 1677a(e). *See* Timken's Resp. at 8–12. Moreover, Timken maintains that the reason Commerce has not conducted a recent determination on Koyo's further manufactured merchandise is because Koyo has consistently refused to supply Commerce with the necessary information to conduct such a review. *See id.* at 10. According to Timken, Commerce correctly relied on adverse facts available and reasonably determined that Koyo's further-manufactured TRBs were likely dumped at greater rates than its "fully manufactured" merchandise. *See id.* Timken further argues that since the United States Customs Service does not maintain CEPs for merchandise imported by related parties, but rather has only entered values, Koyo's proposed methodology would lead to irrational results. *See id.* at 12.

Timken, however, disagrees with Commerce's application of the adverse facts available margin to Koyo's entered value and argues that Commerce should have applied its facts available rate to Koyo's sales value rather than Koyo's entered value. *See* Timken's Mem. Supp. Mot. J. Agency R. Pursuant R. 56.2 ("Timken's Mem.") at 8–14. Timken contends that Commerce's application of the adverse facts available margin to Koyo's entered value was unlawful because: (1) transfer prices are not reliable, *see id.* at 11, 15–18; and (2) Commerce "rewarded Koyo's refusal to supply requested information by applying the 'facts available' rate to Koyo's entered value, rather than to its sales value, for further-processed merchandise, which resulted in a lower dumping margin for Koyo." *Id.* at 14.

D. Analysis

The first issue before the Court is whether Commerce's use of its standard methodology pursuant to § 1677a(d)(2) constitutes another "reasonable basis" under § 1677a(e). To determine whether Commerce's interpretation and application of the antidumping statute is in accordance with law, the Court must undertake the two-step analysis prescribed by *Chevron,* 467 U.S. 837. Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex VI.,* 157 F.3d at 882 (citing *Chevron,* 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is

the statute's text, giving it its plain meaning. * * * Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted).

The end clause of 19 U.S.C. § 1677a(e) clearly provides Commerce with a great deal of discretion in adjusting CEP for the cost of further manufacture and assembly. *See* 19 U.S.C. § 1677a(e). Under § 1677a(e), when the value added to subject merchandise in the United States is likely to substantially exceed the value of the merchandise, Commerce must use specified surrogate prices if two conditions are met. *See id.* The first condition in the preamble of § 1677a(e) that there be "a sufficient quantity of sales to provide a reasonable basis for comparison," is not at issue here. *Id.* The second condition in the preamble of § 1677a(e) requires Commerce to "determine[] that the use of such sales is appropriate." *Id.* Thus, Commerce is not forced to use the surrogate prices if it determines that their use is not "appropriate." *See id.* According to the end clause of § 1677a(e), Commerce is permitted to determine CEP "on any other reasonable basis." *Id.*

Commerce, therefore, may determine the method by which to calculate CEP, when it finds that the use of the surrogate prices is not appropriate. This holds true even if Commerce finds that the value added in the United States "is likely to exceed substantially the value of the subject merchandise * * *." 19 U.S.C. § 1677a(e). Thus, even if Commerce finds that Koyo's added value substantially exceeds the value of the merchandise, Commerce still has the discretion to refuse to apply the Special Rule.

In the case at bar, Commerce determined that

> the record does not lead [Commerce] to conclude that the use of either of the two alternative methods described in [§§ 1677a(e)(1) and (2)] with respect to Koyo's further-manufactured merchandise is appropriate. As noted in [Commerce's *Preliminary Results,* 64 Fed. Reg. 53,323,] the finished merchandise sold by Koyo to the first unrelated [United States] customer was still in the same class or kind as merchandise within the scope of the TRB order and finding *(i.e.,* imported TRB components were processed into TRBs). As a result, the calculation of the precise amount of value added for Koyo's further-manufactured sales would not be nearly as burdensome as it would be for * * * another respondent who imported TRBs for incorporation in automobiles and transmission assemblies. Furthermore, in prior reviews Commerce ha[s] calculated margins for Koyo's further-processed sales and ha[s] extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales. In addition, the record clearly indicates that Koyo's further-manufactured [United States] sales represented a large portion of its total [United States] sales during the POR. Furthermore, A–588–604 margins [Commerce] ha[s] calculated for Koyo for determinations in past reviews in which further-manufactured sales were included in [Commerce's] databases have been significantly higher than margins [Commerce] ha[s] calculated in past reviews of

> Koyo in the A–588–604 case in which there were no further-manufactured sales in our analysis. This indicates that, in this particular case, the margins on further-manufactured sales are not necessarily equivalent to the margins on non-further-manufactured sales. Thus, the standard methodology would likely yield more accurate results in this case.

Issues & Decision Mem. at 12.

The Court finds that Commerce acted within the discretion afforded to it by § 1677a(e) in refusing to apply the Special Rule to Koyo in this review. The Court will not require Commerce to use the Special Rule when it finds the use of the Special Rule inappropriate, since the imposition of such a requirement would be contrary to § 1677a(e). Therefore, since Commerce found that neither alternative under §§ 1677a(e)(1) or (e)(2) were appropriate, Commerce's resort to its standard methodology under § 1677a(d)(2) as an alternative reasonable method is affirmed.[18]

Next, the Court must determine whether Commerce's application of the adverse facts available margin rate to Koyo's entered value in order to calculate the CEP of Koyo's further-manufactured merchandise was in accordance with law. The antidumping statute mandates that Commerce use "facts otherwise available" if "necessary information is not available on the record" of an antidumping proceeding. 19 U.S.C. § 1677e(a)(1). In addition, Commerce may use facts available where an interested party or any other person: (1) withholds information that has been requested by Commerce; (2) fails to provide the requested information by the requested date or in the form and manner requested, subject to 19 U.S.C. §§ 1677m(c)(1), (e) (1994); (3) significantly impedes an antidumping proceeding; and (4) provides information that cannot be verified as provided in 19 U.S.C. § 1677m(i). *See id.* § 1677e(a)(2)(A)–(D). Section 1677e(a) provides, however, that the use of facts available shall be subject to the limitations set forth in 19 U.S.C. § 1677m(d).

Once Commerce determines that use of facts available is warranted, § 1677e(b) permits Commerce to apply an "adverse inference" if it can find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." Such an inference may permit Commerce to rely on information derived from the petition, the final determination, a previous review or any other information placed on the record. *See* 19 U.S.C. § 1677e(c) (1994). When Commerce relies on information other than "information obtained in the course of [the] investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.*

In order to find that a party "has failed to cooperate by not acting to the best of its ability," it is not sufficient for Commerce to merely assert this legal standard as its conclusion or repeat its finding concerning the

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[18] Although Koyo proposes alternative methodologies, the Court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

need for facts available. *See Ferro Union, Inc. v. United States,* 23 CIT 178, 197, 44 F. Supp. 2d 1310, 1329 (1999) ("Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse inference."). Rather, Commerce must clearly articulate: (1) "why it concluded that a party failed to comply to the best of its ability prior to applying adverse facts," and (2) "why the absence of this information is of significance to the progress of [its] investigation." *Ferro Union,* 23 CIT at 200, 44 F. Supp. 2d at 1331.

The Court finds that Commerce's decision to apply adverse facts available was in accordance with law. When Commerce chose to use its standard methodology under § 1677a(d)(2) to calculate the CEP of Koyo's further-manufactured merchandise, Commerce requested that Koyo provide Commerce with responses to the particular section of the questionnaire. In particular, on March 11, 1999, Commerce requested that Koyo provide a response to the specific section of the questionnaire by April 5, 1999. *See* Koyo's Mem. Ex. B. On April 5, 1999, Koyo responded by letter to Commerce stating that "[b]ecause Koyo believes that it qualifies for application of the 'special' rule in 19 U.S.C. § 1677a(e), and has little confidence that it will receive even-handed treatment from [Commerce] in the calculation of the fair value of TRBs further-processed from imported forgings," Koyo declines to submit the Section E response. Koyo's Mem. Ex. F.

As a result of Koyo's refusal to provide responses to the particular section and thereby, failure to act to the best of its ability, Commerce selected "as adverse facts available to Koyo's further-manufactured merchandise the highest rate ever calculated for Koyo in any segment of the A–588–604 proceeding (41.04 percent)." *Issues & Decision Mem.* at 14. Consequently, Commerce's decision to apply the adverse facts available rate to Koyo's entered value to calculate the CEP of Koyo's further-manufactured merchandise was also in accordance with law.

The Court also finds that Timken's argument that Commerce should have applied the adverse facts available rate to Koyo's sales value is without merit. As Commerce correctly argues, "[i]n choosing among the facts available, [Commerce] is not required by the statute to select a method that is 'the most' or 'more reasonably adverse." *Issues & Decision Mem.* at 17. Rather, this Court affirms Commerce's application of the adverse facts available rate to Koyo's entered value since Commerce's methodology was reasonable.

Accordingly, the Court sustains Commerce's resort to its standard methodology under § 1677a(d)(2) and its application of the adverse facts available rate to Koyo's entered value to determine the CEP of Koyo's further-manufactured merchandise.

XI. Commerce's Methodology for Calculating Koyo's Assessment Rate for Antidumping Duties

A. Background

In the subject review, Commerce, following its usual practice in ascertaining cash deposit rates and assessment rates, stated that "[t]he cash deposit rate has been determined on the basis of the selling price to the first unaffiliated [United States] customer. For appraisement purposes, where information is available, [Commerce] will use the entered value of the merchandise to determine the assessment rate." *Final Results*, 65 Fed. Reg. at 11,769.

Any of Commerce's findings concerning assessment rates and cash deposit rates are subject to 19 U.S.C. § 1675(a)(1)(B) (1994) which provides that Commerce shall "review, and determine (in accordance with [§ 1675(a)](2)), the amount of any antidumping duty * * *." Section 1675(a)(2) further states that the dumping margin "shall be the basis for the assessment of * * * antidumping duties on entries of merchandise * * *." 19 U.S.C. § 1675(a)(2)(C).

The dumping margin (equal to the amount of antidumping duty owed) is the amount by which NV exceeds the EP or CEP on the subject merchandise sold during the POR.[19] *See* 19 U.S.C. § 1677(35) (1994).

Normal value is the comparable price for a product like the imported merchandise when first sold (generally, to unaffiliated parties) "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994).

The export price means the "price at which the subject merchandise is first sold * * * by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser," while the constructed export price is the "price at which the subject merchandise is first sold * * * in the United States * * * [by] producer or exporter * * * to a purchaser not affiliated with the producer or exporter * * *." 19 U.S.C. § 1677a(a),(b) (1994).

Cash deposit is a provisional remedy. When Commerce directs Customs to suspend liquidation upon a preliminary determination of dumping, the importer must make a cash deposit of estimated antidumping duties with Customs or post a bond or other security. *See* 19 U.S.C. § 1675(a)(2)(B)(iii). Commerce orders the posting of a cash deposit in an amount equal to the estimated average amount by which the foreign market value exceeds the United States price, that is, the dumping margin. *See* 19 U.S.C. § 1673b(d)(1)(B) (1994); *see also* 19 U.S.C. § 1673e(b) (applying similar calculation for Commerce's final determination). Commerce then calculates the cash deposit rate by dividing "'the aggregate dumping margins by the aggregated United States prices.'" *Na-*

[19] Because Koyo had only CEP sales during the POR, Koyo's arguments address only the calculation of the assessment rate for CEP sales. *See* Koyo's Reply at 22 n.10. However, for the purpose of our analysis, the outcome would be identical if Koyo had both EP and CEP or only EP sales during the POR.

tional Steel Corp. v. United States, 20 CIT 743, 746, 929 F. Supp. 1577, 1581 (1996) (citing 19 C.F.R. § 353.2(f)(2) (1993)); *accord* 19 U.S.C. § 1677(35)(B) (stating that "'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins * * * by the aggregate export prices * * *"). Commerce interprets the term "United States price" as the sale price after Commerce has made all adjustments as provided for by law. *See National Steel*, 20 CIT at 746, 929 F. Supp. at 1581 (citing 19 C.F.R. § 353.41(d)(iii) (1993)).

When an antidumping duty is imposed upon imported merchandise, Commerce calculates an assessment rate for each importer by dividing the dumping margin for the subject merchandise by the entered value of such merchandise for normal Customs purposes. *See* 19 C.F.R. § 351.212(b) (1998).

In promulgating 19 C.F.R. § 351.212(b), Commerce reasoned as follows:

> [Section] 351.212(b)(1) deal[s] with the method that [Commerce] will use to assess antidumping duties upon completion of a review. * * * [Commerce] provided that it normally will calculate an "assessment rate" for each importer by dividing the absolute dumping margin found * * * by the entered value * * *. [The rule] merely codified an assessment method that [Commerce] has come to use more and more frequently in recent years.
>
> Historically, [Commerce] (and, before it, the Department of the Treasury) used the so-called "master list" (entry-by-entry) assessment method. Under the master list method, [Commerce] would list the appropriate amount of duties to assess for each entry of subject merchandise separately in its instructions to the Customs Service. However, in recent years, the master list method has fallen into disuse for two principal reasons. First, in most cases, respondents have not been able to link specific entries to specific sales, particularly in CEP situations in which there is a delay between the importation of merchandise and its resale to an unaffiliated customer[]. Absent an ability to link entries to sales, [Commerce] cannot apply the master list method. Second, even when respondents are able to link entries to sales, there are practical difficulties in creating and using a master list if the number of entries covered by a review is large. Preparing a master list that covers hundreds or thousands of entries is a time-consuming process, and one that is prone to errors by [Commerce] and/or Customs Service staff. * * *

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,314 (May 19, 1997).

B. Contentions of the Parties

1. Koyo's Contentions

Koyo asserts that Commerce unlawfully calculated the antidumping duty assessment rate under 19 C.F.R. § 351.212(b) because Commerce used the entered value for the subject merchandise as the denominator in the formula. *See* Koyo's Mem. at 34–38. Koyo alleges that because 19 U.S.C. § 1675(a)(2) requires that the dumping margin be calculated as

the difference between NV and CEP, and since NV and CEP are both price-based concepts, the logic of the statute necessitates that the denominator used in the formula must also be a price-based concept, specifically, sales value. *See id.* at 36. Koyo, therefore, concludes that Commerce's use of entered value instead of sales value as the denominator is unreasonable. *See id.* at 37–38.

Koyo recognizes this Court's earlier decision in *Koyo Seiko Co. v. United States ("Koyo 2001")*, 110 F. Supp. 2d 934 (2000), *aff'd*, 258 F.3d 1340 (Fed. Cir. 2001), sustaining Commerce's methodology for calculating the assessment rate, but argues that Koyo's arguments in the case at bar differ since in Koyo's CEP transactions, the entered value is based on transactions between the foreign exporter and its single United State's affiliate. Koyo adds that "[t]he antidumping statute generally does not focus on transactions between affiliated parties * * * which is why, in a CEP situation, the statute provides that the [United States] price is to be based on the transaction between the [United States] * * * affiliate and the first unaffiliated purchaser * * *." Koyo's Mem. at 37.

According to Koyo, Commerce's stated reason for using the entered value would apply only if Koyo's subject merchandise were imported by multiple parties, and if Commerce had included the entered value from those multiple partes in the denominator of its assessment rate. *See id.* Koyo claims that, in the case at bar, all of Koyo's merchandise was imported by one United States affiliate, and the entered value used to calculate the assessment rate consisted solely of the entered value of the subject merchandise reported by the single United States affiliate. *See id.*

2. Commerce's Contentions

Commerce contends that the calculation of the assessment rate pursuant to 19 C.F.R. § 351.212(b) by dividing the dumping margin by the entered value of the subject merchandise was reasonable and in accordance with law. *See* Def.'s Mem. at 88–93.

In response to Koyo's contention that the court in *Koyo 2001* fails to properly address the issue that the denominator in Commerce's formula must parallel the numerator, Commerce cites to *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995). The court in *Torrington Co.*, 44 F.3d at 1578, held that 19 U.S.C. § 1675(a) does not "specify a particular divisor when calculating either assessment rates or cash deposit rates." According to Commerce, the "dumping margin or the amount by which the normal value exceeded the export price or [CEP], serves as the basis for the assessment of antidumping duties." Def's Mem. at 90. Commerce further argues CEP is "calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." *Id.* (citing SAA at 812).

Commerce also addresses the argument regarding the importation of Koyo's merchandise by only one United States affiliate. According to Commerce, "it ha[s] other valid motives for adopting entered values as the denominator, for example, administrative ease, accuracy, prompt-

ness and efficiency." *Id.* at 91 (citation omitted). Furthermore, Commerce argues that "it would be unreasonable, if not anomalous, for Commerce to devise an assessment rate formula for importers enjoying exclusivity with manufacturers different from the formula applied to all other importers * * *." *Id.*

Timken generally supports Commerce and points out that, contrary to Koyo's claim, there is binding precedent by the CAFC recognizing Commerce's discretion to use different calculations to determine a duty deposit and assessment rate. Timken's Resp. at 11 (citing *Torrington Co.*, 44 F.3d at 1576, 1581).

C. Analysis

In *Koyo 2001,* 110 F. Supp. 2d at 934, this Court determined and the CAFC affirmed Commerce's methodology for calculating the assessment rate, that is, using the entered value of Koyo's imported merchandise in the assessment rate formula rather than sales value. The Court noted that neither 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) "nor its legislative history provide[d] an 'unambiguously express intent' with regards to the" issue of whether Commerce could use entered value rather than sales value in its calculation of the assessment rate. *Koyo 2001,* 110 F. Supp. 2d at 940.

The Court is unpersuaded by Koyo's argument that its contentions in the case at bar differ from those presented in *Koyo 2001,* 110 F. Supp. 2d at 939. Accordingly, the Court adheres to its reasoning in *Koyo 2001* and, therefore, affirms Commerce's methodology of calculating the assessment rate as reasonable and in accordance with law.

XII. Commerce's Allowance of NTN to Exclude Non-Scope Merchandise From NTN's United States Selling Expenses (Timken)

A. Background

In the underlying review, NTN excluded certain expenses attributable to non-scope merchandise from its reported United States indirect selling expenses. *See Issues & Decision Mem.* at 23–24; Def.'s Mem. at 93. In particular,

> [b]ecause certain of NTN's [United States] expenses were incurred solely for non-scope merchandise, NTN first removed all such expenses from its pool of [United States] expenses * * *. The remaining expenses, which NTN could not specifically link to either scope or non-scope merchandise, were then allocated to scope and non-scope merchandise.

Def's Mem. at 95; *see Issues & Decision Mem.* at 23.

In accepting NTN's methodology of reporting its United States indirect selling expenses, Commerce: (1) verified NTN's United States expenses finding no discrepancies; and (2) stated that it has found NTN's methodology to be reasonable in past TRB and antifriction bearings

cases. *See* Def's Mem. at 95. Commerce also explained how it eliminated the possibility of distortion in NTN's methodology when

> [Commerce] calculated a ratio of sales of scope merchandise to all sales. * * * Commerce then adjusted NTN's reported final indirect selling expense by adding or subtracting various expenses to arrive at a final indirect selling expense. Next, Commerce multiplied that total expense by the ratio of scope-to-total products.

Def.'s Mem. at 96 (referencing Def.'s Mem. Ex. 3 (proprietary version) and *Prelim. Analysis Mem.).*

B. Contentions of the Parties

Timken argues that Commerce improperly permitted NTN to exclude certain expenses attributable to non-scope merchandise from its reported United States indirect selling expenses. *See* Timken's Mem. at 19; Reply Br. Timken ("Timken's Reply") at 6–8; *Issues & Decision Mem.* at 23–24. In particular, Timken asserts that NTN failed to meet its burden by not providing Commerce with full and affirmative documentation that would lead Commerce to reasonably conclude that NTN was entitled to an adjustment to its United States selling expenses. *See* Timken's Mem. at 24. According to Timken, the record is filled with "confused, contradictory, and apparently illogical statements" regarding certain NTN United States expenses and, therefore, Commerce's decision to allow an adjustment was unsupported by substantial record evidence. *See id.* at 24–28. Timken claims that Commerce erred by accepting NTN's unproven claim and requests that the Court "reject Commerce's summary acceptance of NTN's unjustified claim and order that * * * Commerce include [the expenses in question] in the pool of [NTN's] indirect selling expenses * * *." *Id.* at 28.

Timken also contends that even if the Court finds that NTN had demonstrated that such excluded expenses were incurred for out-of-scope merchandise, NTN's methodology "double-allocates expenses to non-scope merchandise" and, therefore, should be rejected. *Id.*

Commerce responds that 19 U.S.C. § 1677a(d), "as amended by the URAA, continues to be silent on the question of allocation methods." Def.'s Mem. at 93–94. Commerce maintains that it found no discrepancies during its verification of NTN's United States expenses and eliminated the possibility of distortion in NTN's methodology when

> [Commerce] calculated a ratio of sales of scope merchandise to all sales. * * * Commerce then adjusted NTN's reported final indirect selling expense by adding or subtracting various expenses to arrive at a final indirect selling expense. Next, Commerce multiplied that total expense by the ratio of scope-to-total products.

Def.'s Mem. at 96 (referencing Def.'s Mem. Ex. 3 (proprietary version and *Prelim. Analysis Mem.)* Pointing out that NTN's allocation methodology was reasonable and not distortive, Commerce asserts that the Court should uphold NTN's reported allocation for United States indirect selling expenses. *See id.* at 96–97.

NTN generally agrees with Commerce and argues that Timken has fundamentally misunderstood NTN's reported data regarding NTN's United States indirect selling expenses. *See* NTN's Resp. Mem. Timken's Nov. 20, 2000 Mem. Supp. R. 56.2 Mot. J. Agency R. ("NTN's Resp.") at 2. According to NTN, Commerce's decision to accept NTN's "reported pool of allocated expenses for [United States] indirect selling expenses is reasonable, and in accordance with law, and Timken's arguments are misguided and confused." *Id.* NTN claims that the record clearly shows that the expenses excluded from NTN's pool of allocated expenses were for merchandise outside the scope of Commerce's order. *See id.* NTN also asserts that its methodology ensures accuracy and avoids double allocation of expenses. *See id.* at 2–4

C. Analysis

The Court upholds Commerce's decision to allow NTN to exclude from its United States selling expenses certain expenses attributable to non-scope merchandise since it is in accordance with law. The Court notes that 19 U.S.C. § 1677a(d) is silent on the question of allocation methods and, thus, grants Commerce considerable discretion. Under 19 C.F.R. § 351.401(g)(1998), Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided [Commerce] is satisfied that the allocation method used does not cause inaccuracies or distortions." In addition, pursuant to 19 C.F.R. § 351.401(g)(4), Commerce "will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable.)"

Based on a careful examination of the record and on the regulatory language of 19 C.F.R. §§ 351.401(g) and (g)(4) that grants Commerce considerable discretion in choosing allocation methods, the Court sustains Commerce's decision to accept NTN's United States selling expenses as reasonable, supported by substantial evidence and in accordance with law. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

CONCLUSION

This case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review in accordance with this opinion. All other issues are affirmed.

(Slip Op. 03–6)

FUJITSU COMPOUND SEMICONDUCTOR, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–01–00009

[Plaintiff's Motion for Summary Judgment is Denied; Defendant's Cross-Motion for Summary Judgment is Granted.]

(Decided January 9, 2003)

Neville Peterson LLP, (Michael K. Tomenga), for Plaintiff.
Robert D. McCallum, Assistant Attorney General, United States Department of Justice, *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, *(Barbara S. Williams),* Assistant Branch Director; *Michael W. Heydrich,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* The court has before it Plaintiff's Rule 56 Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. *See Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Br."); Def.'s Mem. in Supp. of Cross-Mot. for Summ. J. and Opp. to Pl.'s Mot. for Summ J. ("Def.'s Br.").* Plaintiff contends that Defendant made a mistake of fact when failing to reliquidate entries of the subject merchandise improperly classified, after Customs HQ Rulings established the correct classification. *See Pl.'s Br.* at 3. Defendant's cross-motion claims that a petition to reliquidate entries pursuant to 19 U.S.C. § 1520(c)(1)(1988) for a mistake of fact by the United States Customs Service ("Customs") is not applicable because Customs was under no obligation to re-liquidate an entry to conform to a letter ruling issued after liquidation. *See Def.'s Br.* at 5. Defendant also claims Plaintiff is ultimately seeking relief from its failure to protest the entries before they became final for purposes of 19 U.S.C. § 1514, and that § 1520 is not applicable in that case. *Id.* at 5–6.

II. BACKGROUND

Plaintiff, Fujitsu Compound Semiconductor, Inc. ("FMCI" or "Fujitsu") imported the subject merchandise, laser diode modules, which was covered by Customs Headquarters' Further Review decisions regarding the same product imported by Toshiba. *See* HQ 088724 and HQ 088754. The HQ decisions were dated June 2, 1992. They determined the correct classification for the laser diode modules to be HTSUS 8541.40.20 at a dutiable rate of 2 *per cent ad valorem*. The FMCI entries at issue entered at the Port of San Francisco between October 18, 1991 and February 5, 1992, under HTSUS subheading 8541.40.95 dutiable at 4.2 *per cent ad valorem*. *Pl.'s Br.* at 2. Bulletin board notices of liquidation for these entries occurred between April 10, 1992 and May 29, 1992, prior to the HQ

rulings. *Id.* FMCI did not protest these entries and they became final under § 1514(a).[1] FMCI then filed a petition for reliquidation under §1520(c)(1), alleging that Customs had made a mistake of fact in not correcting the entries in light of the HQ rulings.[2] *Id.* Customs granted the petition in part, for all entries for which bulletin board notice of liquidation was posted after June 2, 1992. *Id.* at 2–3. Customs denied the § 1520 petition with regard to those entries for which notice of liquidation had been posted prior to June 2, 1992. Plaintiff timely protested the denial of its petition with regard to the pre-June 2 entries. This protest was denied, and Plaintiff filed appeal with this court. *Id.* at 3.

III. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c). There are no material issues of fact, and both parties agree that summary judgment is appropriate in this case. *See Pl.'s Br.* at 6–7; *Def.'s Br.* at 6.

Customs rulings are entitled to deference relative to their "power to persuade" according to the Supreme Court's holding in *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Under *Skidmore* deference, the court will look to agency "rulings, interpretations and opinions" for guidance. *Skidmore*, 323 U.S. at 140. The weight a ruling will be accorded depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

IV. Discussion

Under 19 U.S.C. § 1520(c) an importer has one year to correct mistakes of fact made during a Customs transaction. Mistakes of law are not

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[1] 19 U.S.C. § 1514(a) (1988) reads as follows:

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), and section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

[2] 19 U.S.C.§ 1520(c)(1) (1988) allows reliquidation for entries incorrectly classified due to mistake of fact, inadvertence, or clerical error. Under the provision Customs may "reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction[.]

correctable under § 1520, and must be corrected by a timely protest of liquidation. Plaintiff argues that Customs' failure to reliquidate all the entries at issue was a mistake of fact or other inadvertence under § 1520. *See Pl.'s Br.* at 8. The specific mistake of fact alleged was the Customs officer's failure to prevent liquidation from becoming final under an incorrect classification. *See id.*

Defendant, in its cross-motion, responds that Plaintiff's argument misses several important points. First, § 1520 is inapplicable to this case because Customs made no affirmative mistake by not reliquidating and was under no obligation to reliquidate or re-examine the liquidated entries. *Def.'s Br.* at 24. There is no mistake by Customs, either of omission or commission, that qualifies for relief under § 1520. Second, Customs regulations provide that ruling letters are applicable to unliquidated entries. *Id.* at 18. Notice of liquidation had been posted with regard to the entries at issue in this case when the relevant ruling letter was issued. Finally, Defendant asserts that Plaintiff was denied relief because it failed to protest entries which were liquidated and that § 1520 cannot be used to correct a failure to protest. *Id.* at 11.

The primary issue is the applicability of the ruling letter. Customs regulations dictate that "a ruling letter is effective on the date it is issued and may be applied to all entries which are unliquidated." 19 CFR § 177.9(a) (1992); *Def.'s Br.* at 18. At the time of the issuance of the relevant HQ ruling, the entries at issue were liquidated. There still remained time to protest the liquidation so the classification would not be final and binding on the parties, but their status was liquidated for purposes of the letter ruling. "The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. This posting or lodging shall be deemed the legal evidence of liquidation." 19 CFR § 159.9(c)(1). It is well settled that the date of liquidation is "the date the bulletin notice is posted in the customhouse." *United States v. Reliable Chem. Co.*, 605 F.2d 1179, 1183 (CCPA 1979). Because liquidation had occurred at the time of the ruling, Plaintiff was required to protest those entries to receive relief. In addition, the mere existence of a HQ letter does not mean it is automatically applicable to entries other than those covered by the letter. The letter ruling in this case was issued to Toshiba on a like-product, not to Fujitsu. Customs regulations provide that other than the party to whom the ruling is addressed, "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 CFR § 177.9(c) (1992). Customs' decision to correct the classification of only those entries which remained unliquidated at the time of the letter ruling was consistent with its regulations, and liquidation was effective for the purposes of the letter ruling's applicability the date the bulletin notice was issued.

Even if the ruling could be applied to post-liquidation entries, Plaintiff must show that Customs was under a legal obligation to re-evaluate

liquidated entries. For Customs to make a mistake in failing to take an action Plaintiff must show that Customs was obliged to take that action. To support its case Plaintiff points to two cases. In *George Weintraub & Sons v. United States,* the Court held Customs' failure to apply a presidential proclamation which affected the status of the entries was a mistake of fact when they were liquidated contrary to the known status. *See* 12 CIT 643, 691 F. Supp. 1449 (1988), *vacated,* 18 CIT 594, 855 F. Supp. 401 (1994). *Zaki Corp. v. United States* involved a ruling issued by Customs HQ which was ignored at liquidation. 21 CIT 263, 960 F. Supp. 350 (1997). The Court held that because the "entries were unliquidated as of the date of issuance of [the HQ ruling], Customs should have liquidated the entries" in accordance with the ruling. *Id.* at 360. In *Zaki,* the Court relied on the existence of the letter ruling to establish only that the classification was wrong, and, therefore, adverse to the importer. *Id.* Failure to follow the letter ruling was not, however, the mistake of fact asserted by the plaintiff. Zaki claimed a mistake was made because of ignorance as to the character of the merchandise, not as to the applicability of a ruling. *Id.* at 354. In addition, both Weintraub and Zaki were corrections to mistakes made by Customs prior to liquidation. In this case, liquidation had already occurred when the ruling was issued. Plaintiff also points to ORR Ruling 75–0026 (Jan. 24, 1975) where Customs recognized that failure to apply an existing HQ ruling when classifying merchandise is a mistake of fact correctable under § 1520. *Pl.'s Br.* at 10. This ruling also deals with a pre-liquidation situation, and, therefore, is not applicable to the facts in this case.

Fujitsu does reference two regulations that instruct Customs to reliquidate to prevent potential loss of revenue that results from a prior disclosure under 19 U.S.C. § 1592, or in a change in duty rates by presidential proclamation or act of Congress. *See Pl.'s Br.* at 15 n.5 (citing 19 CFR § 162.71(a)(2) and § 159.7(b) (1992)). However, these requirements do not shift a burden to Customs to monitor and fix all entries after liquidation. Instead, they indicate only that Customs has accepted the burden of reliquidating in two specific instances: to prevent loss of revenue under prior disclosure and when the underlying law is changed.

No statute compels Customs to reliquidate in a circumstance like this. Under 19 U.S.C. § 1501[3] Customs has within its discretionary authority the ability to reliquidate, but reliquidation under § 1501 is not mandatory. Customs was not required to reliquidate the entries, nor did it take an affirmative step with regard to the entries. There is no need to determine if there was a mistake of law or fact at issue, because there was no mistake. Therefore, failure of Customs to reliquidate is not a mistake

[3] 19 U.S.C. § 1501 (1988) reads as follows:

A liquidation made in accordance with section 1500 of this title or any liquidation thereof made in accordance with this section may be reliquidated in any respect by the appropriate customs officer on his own initiative, notwithstanding the filing of a protest, within ninety days from the date on which notice of original liquidation is given to the importer, his consignee or agent. Notice of such reliquidation shall be given in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

which can be corrected under § 1520(c).[4] Customs is justified in treating in a different manner liquidated entries where it no longer has a responsibility to take action, from those whose classification and liquidation are pending and Customs remains under a statutory duty to take action consistent with the law. Defendant points out that for the court to impose such an obligation would place an enormous burden on Customs to review all entries liquidated within the past 90 days after every ruling to determine if they need to be adjusted. The statute does not require such an effort by Customs and it explicitly places the burden to correct errors in classification after liquidation on the importer who has the ability to protest under § 1514.

Plaintiff does not point to any mistake in the original classification that could be corrected under § 1520. *See Xerox Corp. v. United States*, 26 CIT ____, ____, 219 F. Supp. 2d 1345, 1350–51 (2002). Failure by an importer to protest a liquidation before it becomes final is not a mistake which is correctable under § 1520. *See Fabrene, Inc. v. United States*, 17 CIT 911, 915 (1993). Plaintiff in this case contends Customs misinterpreted the applicable law in the initial classification. Subsequent to that classification, Customs corrected its understanding of the law, but did not reliquidate the entries in question to correct their classification. It is Plaintiff's responsibility to protest a misclassified entry within 90 days, or liquidation will become final. "As plaintiff failed to file a protest within the statutory time period allowed by § 1514, the liquidation of the merchandise is final and conclusive." *Id.* at 915 (citing 19 U.S.C. § 1514).

Section 1520(c)(1) does not serve as "'an alternative to the normal liquidation protest method of obtaining review.'" *Computime, Inc. v. United States*, 9 CIT 553, 556, 622 F. Supp. 1083, 1085 (1985) (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 21, 336 F. Supp. 1395, 1398 (1972)). Plaintiff is correct that, for purposes of § 1514, liquidations do not become final for 90 days after notice. However, that 90 day period is grace time for an importer to protest any mistakes in the classification. Absent any action by the importer the liquidation becomes final, and thereafter the importer can seek relief only for mistakes correctable under § 1520. Customs' inaction here does not constitute a mistake correctable under § 1520 and there is no other basis for the court to grant the relief sought by Fujitsu.

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[4] While the court finds Customs is not legally bound to correct the classification of the entries under § 1520, that does not mean it endorses the wisdom of refusing to do so. While Congress created a distinction between mistakes of law and fact, the difference is not always easily ascertained. *Compare Executone Info. Sys. v. United States*, 96 F.3d 1383 (Fed. Cir. 1996) (Mistake of fact existed when the importer believed at time of importation necessary forms had been filed to qualify for duty-free treatment.) *with Occidental Oil & Gas v. United States*, 13 CIT 244 (1989) (Mistake of fact did not exist when importer failed to file forms to qualify for duty-free treatment and misunderstood the legal consequence of failure to file.). Some of the absurdity of the outcomes in cases involving mistakes could be resolved if Customs were to take a more flexible approach to correcting mistaken classifications. The legislative history to 19 U.S.C. § 1520 would seem to endorse such a action on the part of Customs. *See, e.g., ITT Corp. v United States*, 24 F.3d 1384, 1389 (Fed. Cir. 1994) (quoting the statement of Philip Nichols, Jr., Assistant General Counsel, Treasury Department, *Hearings on H.R. 1535 to Amend Certain Provisions of the Tariff Act of 1930 Before the House Comm. on Ways and Means*, 82 Cong., 1st Sess., at 27: "The refusal to correct patent errors causes hardship, needlessly injures public goodwill toward the Customs Service and public acceptance of the customs laws, and constitutes a psychological handicap to international trade.")

V. CONCLUSION

For the reasons explained above, Plaintiff's Motion for Summary Judgment is denied and Defendant's Cross-Motion for Summary Judgment is granted. Judgment will be entered accordingly.

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